87-670

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

William H. Gilardy, Jr.,
Special Administrator of the Estate of
DAVID LEE THOMPSON; FRANK W.
THOMPSON, DORIE THOMPSON;
and KIM M. THOMPSON, Petitioners

v.

UNITED STATES OF AMERICA, Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Donald L. Salem
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QUESTION PRESENTED

Whether the doctrine of Feres v. United States, 340 U.S. 135 (1950), should be overruled because it is contrary to the language and intent of Congress in the Federal Tort Claims Act and is not supported by any of the three original Feres reasons nor the post hoc rationalization based on the need to preserve "military discipline."

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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v.

UNITED STATES OF AMERICA, Petitioner

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Plaintiffs, William H. Gilardy, Jr., Special Administrator of the Estate of David Lee Thompson, Frank W. Thompson, Dorie Thompson and Kim M. Thompson, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The final opinion of the court of appeal is reported at Gilardy v. United States, 821 F.2d 1427 (9th Cir. July 1987) (App., infra, 5a-6a). The district court's original order dismissing the action is unreported. (App., infra,. 1a)

This case was tied to this Court's disposition of Johnson v. United States, 779 F.2d 1492 (11th Cir. 1986) (App., infra, 128a-151a) on the grant of a petition for certiorari in that case. Johnson involved the death of one of the pilots in the same crash in which Mr. Thompson died.

On May 14, 1985, the appeal from the district court's judgment of dismissal in this case was deferred from submission (Gilardy v. United States, (App., infra, 2a)) pending the Eleventh Circuit's en banc decision on Johnson v. United States,

749 F.2d 1530 (11th Cir. 1985) (App., infra, 8a-56a). On February 10, 1986, after the en banc affirmance of Johnson, the Court of Appeals for the Ninth Circuit deemed the case submitted as of January 13, 1986 (App., infra, 3a). An order filed by the Ninth Circuit on May 1, 1986 then stayed the case pending disposition of the petition for a writ of certiorari in Johnson v. United States, 779 F.2d 1492 (11th Cir. 1986) (en banc) (App., infra, 4a).

On May 18, 1987 this Court issued its opinion in United States v. Johnson, (App., infra, 57a-127a) which is reported at 481 U.S. ___, 95 L.Ed.2d 648, 197 S.Ct. (1987). Thereafter the judgment of the district court was affirmed by the Ninth Circuit on July 15, 1987 (App., infra, 5a-6a).

JURISDICTION

The final opinion of the court of appeal was entered on July 15, 1987. (App., infra, 7a.)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 et seq.], the district courts *** shall exclusive jurisdiction of civil actions on claims against the United States, for money damages *** for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

1. Plaintiffs' decedent David Lee Thompson was riding in a United States Coast Guard helicopter at the time of his death and was on active duty in the United States Coast Guard. He was not a pilot and was not involved in the operation of the helicopter. In the early morning hours of January 1982, the Coast Guard station in Hawaii received notice that a boat was in distress at sea. Thompson was a crew member assigned to the Coast Guard helicopter on duty that night. Two other members of the Coast Guard, including Lt. Commander Horton Johnson (plaintiffs' decedent in Johnson, supra.), were the pilots who flew the helicopter from takeoff at Barber's Point, on the island of Oahu, toward the direction of the area where the boat was believed to be in distress It was dark and clouds obscured the islands.

2. After take-off from Barber's Point, the pilots of the helicopter received radar flight guidance from civilian Federal Aviation Administration Air Traffic Controllers. The helicopter pilots were also communicating with another Coast Guard aircraft that was at the location of the vessel supposedly in distress. The other Coast Guard aircraft reported that the vessel could not be found and recommended that the helicopter not fly to the location until daylight.

3. At that time the helicopter was on the north side of the island of the island of Molokai. The helicopter pilots then asked the Federal Aviation Administration Air Traffic Controllers to provide them with radar guidance to an airstrip on the island of the island of Maui where they intended to land, refuel, and await daylight.

The Federal Aviation Administration Air Traffic Controllers then undertook to provide the helicopter with ordinary, regular radar vectors along the north coast of Molokai to the airport on Maui (not to the location of the vessel supposedly in distress).

4. The Air Traffic Controllers were inattentive and careless. The radar track of the helicopter reveals it was vectored by the FAA Air Traffic Controllers directly into a mountain on Molokai. At the time of the crash, the helicopter was at precisely the altitude, heading and location required for by the air traffic controller. All aboard the helicopter were killed in the crash.

5. Appellants, Mr. Thompson's widow, parents, and executor of his estate, brought this action in the United States District Court for the District of Hawaii

under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 et seq., seeking damages from the United States for the negligence of the FAA Air Traffic Controller only. There was no allegation that Thompson's fellow service members or superior officers played any role in the crash or that they acted negligently.

6. The District Court dismissed the Complaint on the ground that the death of Mr. Thompson arose out of activity incident to military service and therefore was barred by Feres v. United States, 340 U.S. 135 (1950).

7. Johnson involved a wrongful death action by a pilot of the same helicopter in which Mr. Thompson died. The Johnson case subsequently was decided by the Supreme Court which held the claim barred by the Feres doctrine. United States v. Johnson, supra. (App., infra, 57a-

127a.) The Ninth Circuit Court of Appeals, upon being informed of the reversal, then affirmed the decision of the District Court in this case, following the decision of the Supreme Court in Johnson.

8. In United States v. Johnson, supra (App., infra, 57a-127a.) four of the Justices deciding the case dissented from the opinion of the majority and agreed that the entire Feres doctrine had been "wrongly decided." However, they had not been asked to overrule the Feres doctrine and they chose to do so suasponte.

REASONS FOR GRANTING THE PETITION

Justice Scalia, in the dissent to United States v. Johnson, supra joined by Justices Brennan, Marshall, and Stevens, eloquently set forth the reasons why Feres should be overruled:

> Feres was wrongly decided and heartedly deserves the "wide spread, almost universal criticism" it has received. Id. 95 L.Ed.2d __.

Nothing would be gained by repeating verbatim, the dissent and reasoning of the dissenters in United States v. Johnson. That analysis is adopted as the reasons for this Court granting this Petition. While the Court may not have been asked to overrule Feres in Johnson, it is expressly asked to do so by the appellants in this companion case.

CONCLUSION

The petition for a writ of certiorari should be granted. Respectfully submitted,

Donald L. Salem
Luce, Forward, Hamilton & Scripps
Attorneys for Petitioners

OCTOBER 1987

APPENDIX A

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Docket Number CIVIL NO. 83-01277

WILLIAM H. GILARDY, JR., et al.,

v.

UNITED STATES OF AMERICA

NAME OF JUDGE - A. WALLACE TASHIMA

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendant's Motion to Dismiss is hereby GRANTED and the action is dismissed for lack of subject matter jurisdiction.

Clerk: s/ Walter A.Y.H. CHINN
June 13, 1984

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 84-2269

WILLIAM H. GILARDY, JR., ETC.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

Before: FARRIS, PREGERSON, and BEEZER, Circuit Judges.

This matter is deferred from submission pending the filing of the Eleventh Circuit's en banc decision in Johnson v. United States, 749 F.2d 1530 (11th Cir. 1985).

Filed May 14, 1985
Philip B. Winberry
Clerk of U.S. Court of Appeals

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 84-2269 DC# C 83-1277

WILLIAM H. GILARDY, JR., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before: FARRIS, PREGERSON, and BEEZER, Circuit Judges.

This case is deemed submitted as of January 13, 1986.

Filed February 10, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM H. GILARDY, JR.,
Special Administrator of the Estate of
DAVID LEE THOMPSON; FRANK THOMPSON;
DORIE THOMPSON; and KIM M. THOMPSON,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 84-2269 DC No. C 83-1277

ORDER

Before: BROWNING, Chief Judge, SNEED, HUG, TANG, SKOPIL, SCHRODER, FARRIS, NELSON, NORRIS, BEEZER and NOONAN, Circuit Judges.

Further proceedings in this case are stayed pending disposition of the petition for a writ of certiorari in Johnson v. United States, 779 F.2d. 1492 (11th Cir. 1986) (en banc). If a writ of certiorari issues, further proceedings in this case will be stayed until Johnson is disposed of by the Supreme Court.

Filed May 1, 1986 U.S. Court of Appeals

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-2269 D.C. No. C 83-1277

WILLIAM H. GILARDY, JR.,
Special Administrator of the Estate of
DAVID LEE THOMPSON; FRANK W.
THOMPSON; DORIE THOMPSON; and
KIM M. THOMPSON,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ORDER

Filed July 15, 1987

Before: Jerome Farris, Harry Pregerson and Robert R. Beezer, Circuit Judges.

COUNSEL

Luce, Forward, Hamilton & Scripps and Donald L. Salem, San Diego, California for the Plaintiffs-Appellants.

Richard K. Willard, Acting Assistant Attorney General Honolulu, Hawaii; Philip A. Berns, Attorney, and Warren A. Schneider, Trial Attorney, San Francisco, California, for the defendant-appellee.

ORDER

In light of the United States Supreme Court's recent opinion in United States v. Johnson, 55 U.S.L.W. 4647 (U.S. May 18, 1987), the judgment of the district court in this case is AFFIRMED.

APPENDIX F
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASE NO. 84-2269 DC CV 83-1277 AWT

WILLIAM H. GILARDY, JR., ETC.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 15, 1987

APPENDIX G

JOHNSON v. UNITED STATES
Cite as 749 F.2d 1530 (11th Cir. 1985)

Frieda Joyce JOHNSON, personal representative of the Estate of Horton Winfield Johnson, for herself and for the Benefit of Kevin Lee Nix, Cynthia Anne Johnson and Tamara Joyce Nix, Plaintiffs-Appellants.

v.

UNITED STATES of America,
Defendant-Appellee.

No. 83-5764

United States Court of Appeals,
Eleventh Circuit.

Jan. 10, 1985.

Rehearing and Rehearing En Banc
Denied March 26, 1985.

Widow of deceased Coast Guard helicopter pilot brought wrongful death action against United States under the Federal Tort Claims Act. The United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., dismissed suit, and an appeal was

taken. The Court of Appeals, Fay, Circuit Judge, held that suit brought against United States under the Federal Tort Claims Act by widow of helicopter pilot for the United States Coast Guard alleging that pilot died as a result of negligence of civilian air traffic controllers could be maintained even though pilot was killed while acting within course and scope of his duties, since prosecution of claim did not involve or compromise a military relationship or military disciplinary structure, and thus would not encroach upon rationale behind Feres doctrine, a judicially created immunity doctrine.

Reversed and remanded.

United States 78(16).

Suit brought against United States under the Federal Tort Claims Act by widow of helicopter pilot for the United States

Coast Guard alleging that pilot died as a result of negligence of civilian air traffic controllers could be maintained even though pilot was killed while acting within course and scope of his duties, since prosecution of claim did not involve or compromise a military relationship or military disciplinary structure, and thus would not encroach upon rationale behind Feres doctrine, a judicially created immunity doctrine; disagreeing with Uptegrove v. U.S., 600 F.2d 1248, cert. denied, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730.

Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Joel D. Eaton, Miami, Fla., for plaintiffs-appellants.

Jeffrey D. Fisher, Sp. Asst. U.S. Atty., Linda Collins-Hertz, Jonathan

Goodman, Asst. U.S. Attys., Miami, Fla., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and VANCE, Circuit Judges, and MAC MAHON*/, District Judge.

FAY, Circuit Judge:

Frieda Joyce Johnson, plaintiff, brought this wrongful death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680. She alleges that her husband died as a result of the negligence of air traffic controllers employed by the Federal Aviation Administration (FAA). The district court, relying on Feres v. United States, 340 U.S. 135, 71 S.Ct. 153,

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*/ Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

95 L.Ed. 152 (1950), granted the Government's motion to dismiss. We reverse.

FACTUAL BACKGROUND[1/]

Plaintiff's decedent, Horton Winfield Johnson, was a helicopter pilot for the United States Coast Guard, stationed in Hawaii. On January 7, 1982, Johnson and his aircraft were dispatched to search for a civilian boat in distress. Because inclement weather made visual navigation impossible, Johnson requested the civilian FAA controllers to assume positive radar control over the helicopter. The controllers did so and undertook guidance

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1/ Properly viewed, this case involves an appeal from an order dismissing the action for want of jurisdiction. See infra note 2. We therefore accept as true, for purposes of this appeal, the factual allegations contained in plaintiff's complaint. See Radovich v. Nat'l Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); Eaton v. Dorchester Dev., Inc., 692 F.2d 727 (11th Cir. 1982).

from the ground. Unfortunately, the helicopter was vectored into the side of a mountain on the island of Molokai. Johnson was killed in the crash.

After exhausting her administrative remedies, plaintiff brought this action on behalf of herself, her minor children, and her husband's estate, alleging negligence on the part of the civilian FAA air traffic controllers. The Government filed a motion to dismiss, arguing that since plaintiff's decedent was killed while acting within the course and scope of his military duties, the complaint failed to state a claim upon which relief could be granted under the FTCA. The district court agreed, citing only Feres, and dismissed the action with prejudice.[2/]

2/ We note that the Government erroneously contended that since the Feres doctrine barred plaintiff's suit, the complaint failed to state a claim upon which relief could be granted. The law

THE FERES DOCTRINE

Under the common law, the United States was shielded from suit by the doctrine of sovereign immunity. See Feres, 340 U.S. at 139, 71 S.Ct. at 156. In 1946, however, Congress enacted the FTCA, thus marking "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." Id. The FTCA provides that the United States is liable in tort "in the same manner and to the same extent as a private individual

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is clear that "since a defense based on the Feres doctrine is premised on the notion that there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such [a defense] should be raised by a motion to dismiss for lack of subject matter jurisdiction." Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1157 (5th Cir. 1981). It follows that a court which accepts the Feres doctrine defense should not also attempt to adjudicate the merits of the case. Id. at 1157. This, however, is precisely what occurred when the district court dismissed plaintiff's complaint with prejudice, because "[a] dismissal for failure to state a claim is a disposition on the merits." Id. at 1158. In light of our holding, this error is of no consequence.

under like circumstances." 28 U.S.C. § 2674. It also vests in the district courts exclusive jurisdiction over civil actions against the United States based on the alleged negligence of government employees "where the United States, if a private person, would be liable to the claimant [under] the law of the place where the [negligence] occurred." Id. § 2680(j). The text of the act does not mention a blanket prohibition on actions brought by servicemen qua servicemen, yet "the courts rushed in where legislators feared to tread." Parker v. United States, 611 F.2d 1007, 1009 (5th Cir. 1980).

Soon after the FTCA was enacted, the Supreme Court was called upon to determine the statute's impact upon suits brought by servicemen or their survivors against the United States. In Brooks v. United

States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), a serviceman was injured when an army truck collided on a public highway with the civilian automobile in which he was a passenger. The court characterized the injury as one not incurred incident to service, and held that the clear language of the FTCA authorized the serviceman's negligence action against the United States. Id. at 51-52, 69 S.Ct. at 919-920.

Shortly after Brooks was decided, the Supreme Court had occasion to address the applicability of the FTCA to a factual situation not before the Court in Brooks, to wit, a suit against the United States when "each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces." Feres, 340 U.S. at 138, 71 S.Ct.

at 155.[3/] The court in Feres held that the FTCA did not waive the Government's sovereign immunity for injuries to members of the armed services where the injuries arose out of or were in the course of activity incident to service. Id. at 146, 71 S.Ct. at 159. The court offered the following bases for its holding: (1) the absence of parallel private liability; (2) the belief that since state law must be consulted under the FTCA, it would be irrational to leave servicemen injured by others in the military dependent upon geographic considerations over which they

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3/ The Feres decision actually involved three actions against the United States. The Feres case was a wrongful death action brought by the executrix of Feres' estate in which, inter alia, it was alleged that Feres was negligently quartered in a barracks having a defective heating plant. Feres, 340 U.S. at 136-37, 71 S.Ct. at 154-55. In Jefferson v. United States and United States v. Griggs, the plaintiffs alleged medical malpractice on the part of military physicians. Id. at 137, 71 S.Ct. at 155.

have no control; (3) the "distinctively federal character" of the relationship between the United States and those in the military; and (4) the availability of a no-fault compensation system. Id. at 141-46, 71 S.Ct. at 156-59.

Four years after Feres, the Supreme Court decided United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In that case Veterans Administration doctors operated on the knee of a veteran; the knee had been injured while he was on active duty. The veteran brought suit, alleging negligent medical treatment. Despite the fact that the veteran received enhanced disability benefits as a result of the surgery, the court held that his FTCA claim was not barred since the injury sued on occurred after he was discharged from service. Id. at 111-112, 75 S.Ct. at 142-143. The most

significant aspect of the Brown case is not its holding; rather, it is the following statement which has come to be regarded as the single most important, and defensible, rationale for the Feres doctrine which has emerged as Brown's most significant contribution:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [Feres] Court to read that Act as excluding claims of that character.

Brown, 348 U.S. at 112, 75 S.Ct. at 143.

Some of the theoretical underpinnings of the Feres decision fell on hard times after Brown. For example, the view that the FTCA did not contemplate the creation

of a "novel and unprecedented," Feres, 340 U.S. at 141, 71 S.Ct. at 157, cause of action against the United States was undermined in Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and Rayonier Inc. v. United States, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). In Indian Towing, the Supreme Court refused to bar an FTCA claim based on the alleged negligence of the Coast Guard in operating a lighthouse beacon. Over a vigorous dissent arguing the applicability of Feres, see Indian Towing, 350 U.S. at 70, 76 S.Ct. at 127 (Reed, J., dissenting, joined by Burton, Clark, & Minton, J.J.), the court expressly rejected the Government's contention that the FTCA excluded claims based on the negligent performance of an activity unique to the government. Id. at 66-69, 76 S.Ct. at 125-127. The court

reasoned that to premise FTCA liability on the "completely fortuitous circumstance" of "the presence or absence of identical private activity" would be to "attribut[e] bizarre motives to Congress." Id. at 67, 76 S.Ct. at 125. Similarly, in Rayonier, where the court held that an FTCA liability on the "completely fortuitous circumstance" of "the presence or absence of identical private activity" would be to "attribut[e] bizarre motives to Congress." Id. at 67, 76 S.Ct. at 125. Similarly, in Rayonier, where the court held that an FTCA action could be maintained for the alleged negligence of federal firefighters, the court stated:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive

> the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.

Rayonier, 352 U.S. at 319, 77 S.Ct. at 377 (emphasis added).

The continued viability of the Feres doctrine was again questioned, albeit implicitly, in United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), where the Supreme Court was asked to decide whether a federal prison inmate could sue under the FTCA for personal injuries sustained while incarcerated. The Government argued that both Feres and the potential adverse effect liability would have on prison discipline warranted implying an exception to the FTCA so as to bar prisoner claims. Although it was careful not to question the Feres doctrine in the military context, see id. at 159,

83 S.Ct. at 1856, the court's reasoning can arguably be seen as further erosion of the doctrine's supporting rationales. The court echoed the Rayonier conclusion that the absence of analogous private liability was no impediment to FTCA liability, id. (citing Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139), and also noted that "the presence of a compensation system . . . does not of necessity preclude a suit for negligence." Muniz, 374 U.S. at 160, 83 S.Ct. at 1856. Further, the court regarded the supposed adverse effect diverse state personal injury laws would have on prison administration as "more a matter of conjecture than reality," id. at 161, 83 S.Ct. at 1856, and the Government's fear that some prisoners might be prejudiced by a non-uniform right to recover was seen by the court as no excuse for denying them recovery altogether. Id.

at 162, 83 S.Ct. at 1857. Finally, the court invoked the gloss placed on Feres in Brown, and stated that Feres was "best explained" by the fear of what might happen if FTCA suits questioning orders given or acts committed in the course of military duty were allowed, as well as the effect intramilitary litigation might have on the soldier-superior relationship and military discipline. Id. (quoting Brown, 348 U.S. at 112, 75 S.Ct. at 143). Applying this "explanation" to the facts before it, the court in Muniz concluded that while it was possible that litigating prisoner claims would damage prison discipline, the spectre raised by the Government was more hypothetical than real. Muniz, 374 U.S. at 163, 83 S.Ct. at 1858. The court accordingly allowed the plaintiff to pursue his FTCA claim.

Despite the apparent inroads on the theoretical predicates of the Feres doctrine, Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), made it abundantly clear that the doctrine "refused to die the quiet death that some had anticipated." Hunt v. United States, 636 F.2d 580, 588 (DC Cir. 1980). In Stencel, a serviceman injured when an aircraft ejection system malfunctioned brought suit against the United States and Stencel, the manufacturer of the system. Stencel cross-claimed against the Government for indemnity alleging, inter alia, that any malfunction in the ejection system was due to the Government's provision of faulty specifications, requirements, and components. Both the district court and the Eighth Circuit concluded that the serviceman's claim against the

United States and Stencel's cross-claim were barred by the Feres doctrine. Stencel, 431 U.S. at 669, 97 S.Ct. at 2056. Stencel appealed.

To decide whether to allow Stencel's cross-claim when the serviceman's claim against the Government was barred by the Feres doctrine, see id. at 673, 97 S.Ct. at 2058-2059, the court found it necessary to examine the doctrine's supporting rationales. In doing so, the court "dusted off and reasserted," Parker, 611 F.2d at 1011, some of the factors mentioned in Feres and thought discredited by intervening decisions. See id.; Hunt, 636 F.2d at 588. The court identified three factors it apparently considered controlling in Feres doctrine analysis: (1) the distinctively federal character of the relationship between the soldier and

the sovereign; (2) the existence of a no-fault statutory compensation scheme which serves as a substitute for governmental tort liability; and (3) the Brown court's concern about the effect on the military disciplinary structure that would obtain if tort litigation were countenanced. Stencel, 431 U.S. at 670-73, 97 S.Ct. at 2057-59. The court applied each of these factors to the cross-claim indemnity situation, and concluded that the FTCA did not authorize Stencel's claim "for essentially the same reasons that the direct action by [the serviceman] is barred by Feres." Id. at 673, 97 S.Ct. at 2059.

That Stencel was not a jurisprudential aberration was recently confirmed in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). In that case, five Navy enlisted men who

served on board a combat vessel brought suit against several of their superiors, alleging unconstitutional discrimination. The court acknowledged that Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), authorized damage suits against federal officials for constitutional violations in the absence of "special factors counseling hesitation." Chappell, 103 S.Ct. at 2364 (quoting Bivens, 403 U.S. at 396, 91 S.Ct. at 2005). The court therefore undertook to locate any such factors. Enter Feres.

The court in Chappell found that "[t]he 'special factors' that bear on the propriety of [plaintiffs'] Bivens action also formed the basis of this Court's decision in Feres." Chappell, 103 S.Ct. at 2364. It then catalogued three of the bases of the Feres doctrine: (1) the lack of

congressional intent to create a new cause of action with the FTCA; (2) the existence of a statutory compensation system for members of the armed services who are injured or killed; and (3) the unique relationship of the soldier to his superior, and the effect of intramilitary litigation on discipline. Id. at 2364-65. Although the court in Chappell referred to these three rationales for the Feres doctrine as guiding its analysis, its emphasis was clearly on the third factor. See Brown v. United States, 739 F.2d 362, 365 (8th Cir. 1984). The court focused its analysis on the military's unique need for discipline, the existence of military alternatives to civilian judicial review, and Congress' plenary constitutional authority over the military, and concluded that "special factors" did indeed militate against

providing enlisted military personnel a Biven's-type remedy against their superiors. Chappell, 103 S.Ct. at 2367.

Regardless of the "widespread, almost universal criticism of Feres by the lower federal courts and commentators," In re "Agent Orange" Product Liability Litigation, 580 F.Supp. 1242, 1246-47 (E.D.N.Y. 1984) (citing Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983), cert. denied, ? U.S. ?, 104 S.Ct. 1276, 79 L.Ed.2d 680 (1984); Scales v. United States, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983); Hunt, 636 F.2d 505 (9th Cir. 1980); Peluso v. United States, 474 F.2d 605 (3d Cir.), cert. denied, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L.Rev. 316 (1954); Rhodes, The

Feres Doctrine After Twenty-Five Years, 18 A.F.L. Rev. 24 (1976); Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich.L.Rev. 1099 (1977)), it nonetheless "is beyond question that it is the law." Brown, 739 F.2d 261, 265 (8th Cir. 1982), cert. denied, 459 U.S. 1210, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983). We now turn to its application to the facts of this case.

APPLICATION OF FERES DOCTRINE

Plaintiff asserts that, despite Stencel, we should bite the bullet, so to speak, and jettison those rationales for the Feres doctrine which have been criticized over the years. According to plaintiff, whenever a court is faced with a Feres doctrine defense, the inquiry should be limited to the effect maintenance of the suit would have on the military disciplinary structure.[4/]

4/ In support of this view, plaintiff contends that Chappell "mentions only the military discipline rationale of Feres, and therefore implicitly disavows the first two makeweights historically mustered in support of the Feres doctrine." Reply Brief of Appellant at 6. What we are not free to do, however, is ignore three crucial facts. First, the Chappell court did not confine its discussion of Feres to the military discipline rationale. See supra p. 1535. The Chappell court specifically referred to the Feres court's "focus[] on the unique relationship between the government and military personnel," Chappell, 103 S.Ct. at 2365, when that court held that the FTCA did not create a new cause of action against the United States. Further, the Chappell court noted that the Feres decision was influenced by congressional "'enactments . . . which provide systems of

Since litigating her FTCA claim, which is based solely on the conduct of civilians performing a civilian service, see infra note 10, will not implicate "[t]he most compelling rationale for the Feres

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simple, certain, and uniform compensation for injuries or death of those in the armed services.'" Id. (quoting Feres, 340 U.S. at 144, 71 S.Ct. at 158). Second, the reasoning employed by the Chappell court. The court was acutely aware that it was being asked to countenance a Bivens remedy in an area over which Congress exercised plenary constitutional authority. Chappell, 103 S.Ct. at 2365-67. Moreover, the decision in Chappell was informed by the existence of (1) statutes regulating military life; (2) a comprehensive military justice system; and (3) a civilian board which is empowered to review a serviceman's military record. Id. at 2366-67. Surely these factors are analogous to the first two Feres doctrine rationales. Third, even if the Chappell court had completely ignored these rationales, which it did not, we would be hard pressed to infer from that fact a "disavowal" of them. In Chappell the named defendants were individual naval officers, not the United States. Therefore, it is arguable that the rationale concerning the distinctively federal relationship between the United States and its servicemen is inapposite. Also, the failure to discuss a military compensation system for injuries or death would be understandable given the fact that this system hardly could be used as a substitute for money damages for racial discrimination. In short, we are not able to read Chappell as broadly as does the plaintiff.

doctrine," Brown, 739 F.2d at 365, plaintiff contends that the district court should be reversed. The Government, on the other hand, essentially argues that plaintiff's suit is barred simply because the decedent was killed while performing a Coast Guard mission;[5/] that the alleged tortfeasors are civilian employees of the FAA who were acting in purely civilian

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5/ The Government correctly notes that the Coast Guard is considered to be a military service and branch of the armed forces at all times, 14 U.S.C. § 1, and that when serviceman Johnson was killed he was fulfilling one of the Coast Guard's primary duties. By statute, the Coast Guard is required to establish and maintain "rescue facilities for the promotion of safety on . . . the high seas and waters subject to the jurisdiction of the United States." Id. § 2. To discharge this responsibility, the Coast Guard is authorized to "perform any and all acts necessary to rescue and aid persons and protect and save property." Id. § 88(a)91). The unique facts of this case, however, present a rather interesting wrinkle. Absent a declaration of war or presidential directive, the Coast Guard is a service in the Department of Transportation, not the Navy. Id. §§ 1 & 3. As a consequence, serviceman Johnson and the alleged tortfeasors were employees of the same department. See infra note 10.

capacities when the alleged tort occurred is, in the Government's view, wholly irrelevant. Although we reach the result sought by the plaintiff, we need not decide whether the approach she advances is appropriate when the tort sued upon is based on the conduct of a member of the military.[6/] We also decline the

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6/ As we understand it, plaintiff's position is that even if the serviceman's injuries are caused by the negligence of others in the military, the court should examine the facts of the case to see if maintenance of the suit would threaten the military disciplinary structure. A review of the law in this area reveals that this position has its advocates. The Ninth Circuit, for example, in Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983), did conduct such an inquiry in determining whether an active duty serviceman was engaging in activities incident to his service at the time of injury. After discounting the first two rationales for the Feres doctrine as set forth in Stencel, the Johnson court stated that "the necessity of safeguarding military discipline provides the most fundamental rationale for limiting recovery under the FTCA to injuries that are not incident to military service." Id. at 1436. After viewing the facts of the case "in light of [this] underlying disciplinary rationale," id., the court allowed the FTCA claim to proceed, since "the civil litigation of negligence claims such as Johnson's could not

Government's invitation to affirm the

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possibly have any effect whatsoever on military discipline." Id. at 1439; see Lee v. United States, 261 F.Supp. 252, 256 (C.D. Cal. 1966) (cited in Stanley, 639 F.2d at 1152), rev'd, 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969); Downes v. United States, 249 F.Supp. 626, 628 (E.D.N.Y. 1965) (To determine whether a serviceman was injured incident to military service, the real question is: "Was plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom?"); see also Brown, 739 F.2d at 366 (To decide whether a serviceman was engaged in activity incident to service when injured, the court must "examine the facts of each case . . . and determine whether they fall within the reasons given by the Supreme Court for its conclusion in Feres.") (quoting Miller v. United States, 643 F.2d 481, 493 (8th Cir. 1981)(en banc)); cf. Stanley, 639 F.2d at 1152 (serviceman's FTCA claim barred by Feres doctrine in part because "the relationship between [the plaintiff] and the alleged negligent individuals stemmed from their official military relationship"). But see Torres v. United States, 621 F.2d 30, 32 (1st Cir. 1980) (Feres doctrine bars FTCA suit "even in the absence of a clear nexus between the injury and military discipline") (citing Hall v. United States, 451 F.2d 353 (1st Cir. 1971)); Uptegrove v. United States, 600 F.2d 1248 (9th Cir.1979), cert. denied, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969).

Sound as this approach might be, we do not feel it is necessary in this instance because we are not faced with a typical Feres factual paradigm. We do note that some courts have not embraced a case-by-case inquiry into whether allowing a

district court in automation fashion.

Parker, 611 F.2d 1007, is the appropriate analytical point of departure. In that case, Parker, an off-duty serviceman who was driving a civilian vehicle to his off-base home, was killed in a collision with a military vehicle driven by another serviceman. The accident occurred on an army maintained

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particular suit would threaten military discipline. See Hunt, 636 F.2d at 599 n.51; Hall, 451 F.2d at 354 (If every injury 'aris[ing] out of or . . . incident to service,' [Feres], 340 U.S. at 146, 71 S.Ct. at 159, must invite inquiry, not only would the difficulties of what, legally, would constitute discipline-connected be substantial, but the Armed Services would be faced with maintaining a claims department.") Arguably, Parker, 611 F.2d 1007, also suggests that any such case-by-case inquiry is inappropriate when the alleged tortfeasor is a member of the armed services. See infra pp. 1537-1538. We feel free to conduct such an inquiry here, however, since we must determine "whether, as a general question of law, the Feres doctrine should be extended to", Hunt, 636 F.2d at 599 n. 51 (emphasis added), a factual situation radically different from the typical Feres doctrine case, where the alleged tortfeasor is a member of the armed services. See infra pp. 1538-1539. The alleged tortfeasor here is a civilian.

road within the confines of the military base where Parker was stationed. Earlier that day, Parker had received permission to be away from his duties for the next four days. The court framed the issue as whether, in these circumstances, Parker was engaged in activities incident to his military service at the time of his death. Id. at 1009. After examining Parker's duty status at the time of the accident, the location of the accident, and what happened, the court concluded that the wrongful death action was not barred by the Feres doctrine. Id. at 1013-15.

Both parties rely on Parker in support of their positions.[7/] Contrary to plaintiff's understanding of that decision, however, the Parker court did not hold as it did because allowance of the suit would not directly implicate any of the Feres doctrine rationales as elucidated in Stencel. Rather, the court specifically noted that the "Distinctively Federal Character" and "Relation of Soldier to Superiors" rationales are more

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7/ Plaintiff argues that lurking between the lines in Parker is a rejection of the first two factors identified in Stencel as supporting the Feres doctrine, even though the Parker court acknowledged that Stencel "reaffirmed that the doctrine lives." Parker, 611 F.2d at 1010. Since maintaining the suit in Parker was seen as not interferring with military discipline, see Id. at 1013, and the FTCA suit was allowed in that case, plaintiff suggests that Parker dictates the same result here. Predictably, the Government views Parker as support for its position because, unlike the situation in that case, plaintiff's decedent was piloting a Coast Guard helicopter pursuant to orders from his superiors at the time of his death. The simplicity of both positions is appealing, but Parker stands for neither position.

relevant to the wisdom of implying an exception to the FTCA in the first instance, than they are to determining whether, given a particular factual situation, a serviceman was injured "incident to service." Id. at 1012-13. Similarly, the alternative compensation rationale was of no particular relevance to the court's inquiry since the compensation system is deemed to be the exclusive remedy for a serviceman's injuries only when the injuries are a result of activity that is incident to service. Id. at 1012.

This does not mean, however, that Parker supports the Government's position. The facts in Parker, and nearly all the cases decided by reference to Feres, involved the typical Feres factual paradigm--an FTCA suit for injuries or death allegedly caused by the negligence

of a serviceman or an employee of the armed forces. See, e.g., Brooks, 337 U.S. at 50, 69 S.Ct. at 919 (negligence of civilian employee of the United States Army); Feres, 340 U.S. at 138, 71 S.Ct. at 155 ("negligence of others in the armed forces"); Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (negligence of Veterans Administration medical personnel). As we see it, the teaching of Feres and its progeny, notably Parker, is that when the Feres factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service. See Feres, 340 U.S. at 146, 71 S.Ct. at 159. If, however, the alleged tortfeasor is not a member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces, we conclude that a court should consult the Feres doctrine

rationales as set forth in Stencel "to determine to what extent, if any, allowance of [the] claim would circumvent the purposes of the [FTCA] as . . . construed by the [Supreme] Court." Stencel, 431 U.S. at 670, 97 S.Ct. at 2057. This approach is not novel. The Supreme Court, in those situations not fitting neatly into the Feres factual paradigm, has found it entirely appropriate to inquire if the doctrine's rationales applied with equal vigor to the facts before it so as to justify immunizing the government or a governmental official from liability. The Chappell, Stencel, and Muniz courts employed this analysis.

Our decision to employ such an approach is further buttressed by a particularly instructive case, Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980). In Hunt, three plaintiffs brought suit alleging

that mandatory swine flu inoculations received while on active duty caused them serious illness. As in this case, a rigid literal reading of Feres would have required barring the plaintiffs' claims against the United States since the plaintiffs were on active duty when required to do that which eventually caused them the harm sued upon. Yet the Hunt court resisted the temptation to automatically extend the Feres bar to a factual situation not akin to the Feres factual paradigm.[8/] The court instead found that

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8/ Briefly put, the swine flu immunization program established that a claim otherwise available against the manufacturer of the vaccine could be brought against the United States as a substitute party defendant. Hunt, 636 F.2d at 592. The Hunt court viewed this situation as materially different from that which would be presented if the servicemen alleged they had been injured by fellow members of the armed services. If the alleged tort had been committed by a fellow serviceman, the Feres doctrine would bar suit against the United States. Id. at 595 n. 40, 596 n. 42.

the Feres doctrine was not directly applicable. Id. at 597. It therefore felt impelled to "examine the policies on which the [Feres] doctrine rests to determine whether its application would be appropriate," id., given the unique facts presented. The court concluded that none of the policies behind the Feres doctrine, "[a]s recapitulated in Stencel," id., supported exempting the Government from liability simply because the United States was the defendant, and accordingly held that the doctrine was no bar to governmental liability.[9/] Id. at 597-600.

9/ The Hunt court's reasoning was recently echoed by the Ninth Circuit in Brown v. United States, 715 F.2d 463 (9th Cir. 1983), another case involving a serviceman's suit against the Government for injuries allegedly resulting from mandatory swine flu inoculation. The court relied extensively on Hunt and its earlier decision in Johnson, 704 F.2d 1431, see infra note 6, to hold that the serviceman's suit was not barred by the Feres doctrine. The Fifth Circuit, in Scales v. United States, 685 F.2d 970, 971 (5th Cir. 1982), cert. denied, 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983),

We also conclude, employing this analysis, that the Feres doctrine does not bar plaintiff's FTCA claim. This much-maligned doctrine, as we have seen, is best explained by the desire to avoid civilian court inquiry into matters that the Supreme Court views as best left beyond the pale of judicial scrutiny. This desire is understandable, given the fact that "the military is, of necessity, a specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). Recognizing the

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held that the Feres doctrine barred an infant's FTCA suit alleging that he was born with congenital rubella syndrome as a result of negligent medical treatment his mother received while on active duty in the Air Force. It reached this result, however, by utilizing the same analysis that the Hunt and Brown, 715 F.2d 463, courts utilized. See Scales, 685 F.2d at 973 ("Stencel and its progeny direct our inquiry to the manner in which the policies underlying Feres are affected--specifically the impact on military discipline--rather than to the status of the claimant.")

uniqueness of the military, the Supreme Court has consistently been chary of countenancing civilian court litigation brought by servicemen against fellow soldiers or superior officers. For example, the court recently reasoned that "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel," Chappell, 103 S.Ct. at 2367, militated against exposing officers sued by their subordinates to a Bivens remedy. Id. In Stencel, the court disallowed third-party indemnity claims against the United States arising out of service-connected injuries to soldiers, in part because "[t]he trial[s] would . . . involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions."

Stencel, 431 U.S. at 673, 97 S.Ct. at 2059. Similarly, the Brown court expressed its concern over the effect intramilitary litigation might have on discipline, particularly when the suit involved "negligent orders given or negligent acts committed in the course of military duty." Brown, 348 U.S. at 112, 75 S.Ct. at 143. The common thread running through these cases is the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function.

With these principles in mind, we have little difficulty concluding that the Feres doctrine does not bar plaintiff's FTCA suit. The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the

helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial.[10/] Nor is there a suggestion that examining the conduct of a civilian would in any way implicate the military

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10/ Although we have no cause to doubt that the FAA could have been placed under the direct control of the armed forces, the fact remains that Congress chose to make the FAA a civilian administration within the Department of Transportation. See Act of Jan. 12, 1983, Pub.L. No. 97-449, 1982 U.S.Code Cong. & Ad.News (96 Stat. 2413) (2416) (to be codified at 49 U.S.C. § 106(a) (revising without substantive change 49 U.S.C. § 1341(a)). It bears mentioning that the Adminstrator of the FAA must be a civilian, and if the Administrator is a former regular officer of an armed service, the Deputy Administrator may not be an officer on active duty in an armed service, a retired regular officer in an armed service, or a former regular officer in an armed service. Act of Jan. 12, 1983, Pub.L. No. 97-449, 1982 U.S.Code Cong. & Ad.News (96 Stat. 2413) (2416) (to be codified at 49 U.S.C. § 106(c) & (d) (revising without substantive change 49 U.S.C. §§ 1341(b), 1342(b), and 1652(e)(2)).

services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the Feres doctrine." Hunt, 636 F.2d at 599. We therefore are unable to discern any sound reason for barring plaintiff's suit under the Feres doctrine.[11/]

We acknowledge that the Ninth Circuit, in a case strikingly similar to this one,

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11/ As we have seen, the military discipline rationale for the Feres doctrine, first offered by the Supreme Court in Brown, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139, has come to be viewed as the doctrine's "best explanation." See Chappell, 103 S.Ct. at 2365; Muniz, 374 U.S. at 162, 83 S.Ct. at 1857. We have not discovered any Supreme Court case decided since the Brown court's amplification of the Feres decision suggesting that we should extend the doctrine to bar a suit which cannot conceivably impinge on the military disciplinary structure.

has reached the opposite conclusion. In Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), cert. denied, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980), a Navy lieutenant flying home on leave as a military space available passenger aboard an Air Force C-141 transport was killed when it crashed into a mountain. His wife brought a negligence action against the United States and three FAA air traffic controllers. The Ninth Circuit, concluding that the lieutenant was killed while engaging in activity incident to service, held that the Feres doctrine barred the suit. The court reasoned that the Supreme Court has never indicated that the Feres doctrine applies only to situations involving a threat to military discipline, Uptegrove, 600 F.2d at 1250 (citing United States v. Lee, 400 F.2d 558, 564 (9th Cir. 1968), cert.

denied, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969)), and the focus in a Feres doctrine case should be solely on the serviceman's military status, not the status of the tortfeasor. Uptegrove, 600 F.2d at 1251 (citing Lee, 400 F.2d at 562).

With all due respect to the Ninth Circuit, it is our view that Uptegrove was wrongly decided. As an initial matter, the court accorded no weight at all to the fundamental fact that in Stencel, Brown, Feres, and Brooks, the relevant Supreme Court bench-marks antedating the Uptegrove decision, the alleged tortfeasor was a serviceman or an employee of the military, not an employee of a civilian branch of the Government performing a civilian task. Ignoring this distinction and blindly applying a rule to a factual scenario materially different from that which

spawned the rule itself "has the virtue of easy application, [but is not] the better jurisprudential course." Brown, 739 F.2d at 366 (quoting Miller v. United States, 643 F.2d 481, 493 (8th Cir. 1981) (en banc)). Moreover, the Ninth Circuit's statement that a threat to military discipline need not be present for Feres to apply reveals a misunderstanding of the third rationale for the Feres doctrine.[12/] By definition, whenever the lawsuit is based on injuries incurred incident to service, and the Feres factual paradigm is present, the "military discipline" rationale is implicated because the Supreme Court "has found it

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12/ We also doubt that the Ninth Circuit, if faced with the Uptegrove fact pattern today, would be so rigid in its analysis. See supra notes 6 & 9 for a discussion of Johnson, 704 F.2d 1431, and Brown, 715 F.2d 463, recent Ninth Circuit cases which emphasized the military discipline rationale for the Feres doctrine.

unseemly to have military personnel, injured incident to service, asserting claims that question the propriety of decisions or conduct by fellow members of the military." Hunt, 636 F.2d at 599. Additionally, in the post-Brown Supreme Court cases where the Feres doctrine was consulted for guidance, the doctrine's third rationale figured prominently in the court's decisions. See Chappell, 103 S.Ct. at 2365, 2367; Stencel, 431 U.S. at 673, 97 S.Ct. at 2058; Muniz, 374 U.S. at 162-63, 83 S.Ct. at 1857-58. Finally, while the Ninth Circuit's position that the status of the tortfeasor need not be examined may be defensible when the Feres factual paradigm is present, it is not as defensible when the facts permit the court to decide whether to imply an exception to the FTCA. Cf. Feres, 340 U.S. at 142, 71 S.Ct. at 157 (Court, when discussing

analogous private liability, cautioned against "ignor[ing] the status of both the wronged and the wrongdoer").

CONCLUSION

Despite the barrage of criticisms leveled at the Feres doctrine and its theoretical predicates over the years, the fact remains that it still is the law.[13/] We accordingly must adhere to it until instructed to do otherwise by the Supreme Court or Congress. That does not mean, however, that we should blindly hand to the Government judicially-created immunity from suit in a factual situation not present in, nor contemplated by, the Feres decision. Having determined that the principal raison d'etre of the Feres doctrine will not be implicated by allowing plaintiff to pursue her claim against the Government, we decline to

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13/ It should be noted that the Supreme Court recently accepted an invitation to revisit the Feres doctrine. See Shearer v. United States, 723 F.2d 1102 (3d Cir. 1983), cert granted, ___ U.S. ___, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984).

extend the doctrine to bar her suit. Therefore, the fact that serviceman Johnson was killed while on a Coast Guard mission is simply not controlling. We are mindful of an observation made by the Supreme Court in a related context: "There is no justification for this court to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for the same body that adopted it." Muniz, 374 U.S. at 166, 83 S.Ct. at 1859 (quoting Rayonier, 352 U.S. at 320, 77 S.Ct. at 377).

The judgment of the district court is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

APPENDIX H

U.S. SUPREME COURT REPORTS

UNITED STATES, Petitioner

v.

FRIEDA JOYCE JOHNSON,
Personal Representative of the Estate of
HORTON WINFIELD JOHNSON,
Deceased, etc., et al.

481 US ___, 95 L.Ed.2d 648, 107 S.Ct.___
No. 85-2039

Argued February 24, 1987, Decided May 18, 1987.

Decision: In Federal Tort Claims Act suit on behalf of deceased Coast Guard officer, incident-to-service bar to action held to apply even though death allegedly resulted from negligence of federal civilian employees.

SUMMARY

Under the doctrine of Feres v. United Sates (1950) 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153, the Federal Government is

not liable under the Federal Tort Claims Act (FTCA) (28 USCS §§ 1346, 2671-2680) for injuries to a service member where the injuries arise out of or in the course of activity incident to the member's military service. A United States Coast Guard officer--a helicopter pilot--was dispatched on a rescue mission. After the officer requested radar assistance from civilian air traffic controllers of the Federal Aviation Administration, and the controllers assumed radar control of the officer's helicopter, the helicopter crashed into a mountain in Hawaii, killing the officer and the rest of the crew. The officer's widow filed a wrongful death action under the FTCA in the United States District Court for the the Southern District of Florida, and alleged that the controllers' negligence caused her husband's death. The District Court, how-

ever, relying on the Feres doctrine, dismissed the action, on the ground that the officer had been killed in the course of his military duties. On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit reversed, and expressed the view that the Feres doctrine did not bar an FTCA suit on behalf of a service member, where the alleged federal tortfeasors--the air traffic controllers--were not (1) members of the Armed Forces, or (2) civilian employees engaged in activities usually associated with the Armed Forces (749 F.2d 1530). On rehearing, an en banc opinion of the Court of Appeals eventually agreed with the panel, and, reinstating the panel opinion, expressed the view that the panel opinion had given proper consideration to the Feres factors, with particular attention to whether the claims asserted in the

case would implicate civilian courts in conflicts involving the military structure or military decisions (779 F.2d 1492).

On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings. In an opinion by POWELL, J., joined by REHNQUIST, Ch. J., and WHITE BLACKMUN, and O'CONNOR, JJ., it was held that (1) the Feres doctrine bars an FTCA suit on behalf of a service member killed during the course of an activity incident to the member's military service, even though the complaint alleges negligence on the part of civilian employees of the Federal Government, instead of on the part of military personnel; and (2) within the meaning of the Feres doctrine, the Coast Guard officer's death in the case at hand arose directly out of an activity which was incident to the officer's military service.

SCALIA, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissented, expressing the view that (1) Feres v. United States was wrongly decided; and (2) without resolving whether to overrule Feres v. United States, the Supreme Court ought to draw a line between FTCA suits alleging military negligence, and those alleging civilian negligence, in order to limit the incorrect decision in Feres v. United States.

HEADNOTES

Classified to U.S. Supreme Court Digest,

Lawyers' Edition

Claims § 82 -- on behalf of service member -- Federal Tort Claims Act -- death incident to service -- negligence of federal civilian employees

1a-1e. The doctrine of Feres v. United States (1950) 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153, bars an action under the Federal Tort Claims Act (28 USCS §§ 1346, 2671-2680) on behalf of a service member killed during the course of an activity incident to the member's military service--even though the complaint alleges negligence on the part of federal civilian employees, instead of on the part of

military personnel--where (1) Congress has not changed the Feres standard since it was articulated; (2) the military status of the alleged tortfeasors is not crucial to the application of the doctrine; (3) the Feres doctrine has been applied consistently to bar all suits on behalf of a service member based upon service-related injuries; and (4) civilian employees of the Federal Government may play an integral role in military activities, and, in such circumstances, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into into military judgments. (Scalia, Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

8 Am Jur 2d, Aviation §§ 95, 129; 35 Am Jur 2d, Federal Tort Claims Act §§ 28, 70, 75

31 Federal Procedure, L Ed, Tort Claims Against the United States §§ 73:186, 73:349, 73:350

15A Federal Procedural Forms, L Ed, Tort Claims Against United States §§ 63:102, 63:143, 63:166

11A Am Jur Pl & Pr Forms (Rev), Federal Tort Claims Act, Forms 53, 55, 76

8 Am Jur Trials 635, Federal Tort Claims Act Proceedings; 22 Am Jur Trials 517, Helicopter Accident Litigation

28 USCS §§ 1346, 2671-2680

US L Ed Digest, Claims § 82

Index to Annotations, Air Traffic Controller; Armed Forces; Coast Guard; Federal Tort Claims Act; Feres Doctrine; Helicopters

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™.** Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

ANNOTATION REFERENCES

Federal compensation acts as affecting recovery under Federal Tort Claims Act. 17 L.Ed.2d 929.

Right of member of family of serviceman to maintain action under Federal Tort Claims Act (28 USCS §§ 1346(b), 2671-2680) against United States based on injuries sustained by serviceman while on active duty. 69 ALR Fed 949.

Liability of United States for negligence of air traffic controller. 46 ALR Fed 24.

Serviceman's right to recover under Federal Tort Claims Act (28 USCS §§ 2671 et seq.). 31 ALR Fed 146.

Aviation: helicopter accidents. 35 ALR3d 707.

Claims § 82 -- on behalf of Coast Guard officer -- Federal Tort Claims Act -- death incident to service

2a-2d. Within the meaning of the doctrine of Feres v. United States (1950) 340 U.S. 135, 95 L.Ed. 152, 75 S.Ct. 153, which bars suits under the Federal Tort Claims Act (26 USCS §§ 1346, 2671-2680) by or on behalf of service members for

injuries which arise out of or in the course of activity incident to service, a United States Coast Guard officer's death arises directly out of an activity incident to his military service, where (1) pursuant to 14 USCS § 1, the Coast Guard is a military service; (2) the officer is killed while performing a rescue mission on the high seas--a primary duty of the Coast Guard under 14 USCS §§ 2, 88(a)(1); (3) the officer goes on the rescue mission specifically because of his military service; (4) the officer's widow receives benefits on account of the officer's death under the Veterans' Benefits Act (38 USCS §§ 301 et seq.); and (5) the potential that such a suit could implicate military discipline is substantial, because the officer was acting pursuant to standard operating procedures of the Coast Guard. (Scalia,

Brennan, Marshall, and Stevens, JJ., dissented in part from this holding.)

Claims § 82 -- by service members -- Federal Tort Claims Act -- injuries incident to service

3a-3d. Under the doctrine of Feres v. United States (1950) 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153, service members cannot bring suits against the Federal Government under the Federal Tort Claims Act (28 USCS §§ 1346, 2671-2680) for injuries that arise out of or in the course of activity incident to the members' military service, because (1) the distinctly federal relationship between the Federal Government and members of its armed forces is implicated to the greatest degree when a service member is performing activities incident to his federal service; (2) the existence of generous

statutory disability and death benefits for such service members indicates that (a) Congress did not intend to provide such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the Act, and (b) instead, the statutory veterans' benefits provide an upper limit of liability for the Federal Government as to service-connected injuries; and (3) even if military negligence is not specifically alleged in a tort action, (a) a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission, and (b) such a suit--contrary to the need of the military, as a specialized society, for obedience, duty, loyalty, and commitment--has the potential

to disrupt military discipline in the broadest sense of the word. (Scalia, Brennan, Marshall, and Stevens, JJ., dissented in part from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

Under Feres v. United States, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 the Government has no Federal Tort Claims Act (FTCA) liability for injuries to members of the military service arising out of or in the course of activity incident to service. Respondent's husband, a helicopter pilot for the Coast Guard, was killed when his helicopter crashed during a rescue mission. Shortly before the crash, air traffic controllers from the Federal Aviation Administration, a civilian agency of the Federal Government, had assumed positive radar control over the helicopter. After receiving veterans'

benefits for her husband's death, respondent filed an FTCA action seeking damages from the Government on the ground that the controllers' negligence had caused the crash. The Federal District Court dismissed the complaint, relying exclusively on Feres. However, the Court of Appeals reversed, distinguishing Feres from cases such as the present in which negligence is alleged on the part of a Government employee who is not a member of the military. Finding the effect of a suit on military discipline to be the Feres doctrine's primary justification, the court ruled that Feres did not bar respondent's suit since there was no indication that the conduct or decisions of military personnel would be subjected to scrutiny if the case proceeded to trial.

Held: The Feres doctrine bars an FTCA action on behalf of a service member killed during an activity incident to service, even if the alleged negligence is by civilian employees of the Federal Government. Pp 4-10.

(a) This Court and the lower federal courts have consistently applied the Feres doctrine since its inception, and have never suggested that the military status of the alleged tortfeasor is crucial. Nor has Congress seen fit to change the Feres standard in the more than 35 years since it was articulated.

(b) The three broad rationales underlying Feres refute the critical significance ascribed to the status of the alleged tortfeasor by the Court of Appeals. First, the distinctively federal character of the relationship between the Government and Armed Forces personnel

necessitates a federal remedy that provides simple, certain, and uniform compensation, unaffected by the fortuity of the situs of the alleged negligence. Second, the statutory veterans' disability and death benefits system provides the sole remedy for service-connected injuries. Third, even if military negligence is not specifically alleged in a service member's FTCA suit, military discipline may be impermissibly affected by the suit since the judgments and decisions underlying the military mission are necessarily implicated, and the duty and loyalty that service members owe to their services and the country may be undermined.

(c) Respondent's husband's death resulted from the rescue mission, a primary duty of the Coast Guard, and the mission was an activity incident to his

service. Respondent received statutory veterans' benefits on behalf of her husband's death. Because respondent's husband was acting pursuant to standard Coast Guard Operating Procedures, the potential that this suit could implicate military discipline is substantial. Thus, this case falls within the heart of the Feres doctrine.

779 F.2d 1492, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun, and O'Connor, JJ., joined. Scalia, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Donald B. Ayer argued the cause for petitioner.

Joel D. Eaton argued the cause for respondents.

OPINION OF THE COURT

Justice **Powell** delivered the opinion of the Court.

[1a, 2a] This case present the question whether the doctrine established in Feres v. United States, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950), bars an action under the Federal Tort Claims Act on behalf of a service member killed during the course of an activity incident to service, where the complaint alleges negligence on the part of civilian employees of the Federal Government.

I

Lieutenant Commander Horton Winfield Johnson was a helicopter pilot for the United States Coast Guard, stationed in Hawaii. In the early morning of January 7, 1982, Johnson's Coast Guard station received a distress call from a boat lost in the area. Johnson and a crew of several other Coast Guard members were dispatched to search for the vessel. Inclement weather decreased the visibility, and so Johnson requested radar assistance from the Federal Aviation Administration (FAA), a civilian agency of the Federal Government. The FAA controllers assumed positive radar control over the helicopter. Shortly thereafter, the helicopter crashed into the side of a mountain on the island of Molokai. All the crew members, including Johnson, were killed in the crash.

Respondent, Johnson's wife, applied for and received compensation for her husband's death pursuant to the Veterans' Benefits Act, 72 Stat 1118, as amended, 38 U.S.C. § 301 et seq. (1982 ed and Supp III) [38 U.S.C. §§ 301 et seq.].[1/] In addition, she filed suit in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U.S.C §§ 1346, 2671-2680 [28 U.S.C. §§ 1346, 2671-2680]. Her complaint sought damages from the United States on the ground that the FAA flight controllers negligently caused her husband's death. The Government filed a

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1/ Respondent has received $35,690.66 in life insurance, a $3,000 death gratuity, and receives approximately $868 per month in dependency and compensatory benefits. Brief for United States 3, n 1. The dependency and compensatory benefits normally are payable for the life of the surviving spouse and include an extra monthly sum for any surviving child of the veteran below age 18. See 38 U.S.C §§ 410, 411 (1982 ed and Supp III) [38 U.S.C.S. §§ 410, 411]; 38 CFR § 3.461 (1986).

motion to dismiss, asserting that because Johnson was killed during the course of his military duties, respondent could not recover damages from the United States. The District Court agreed and dismissed the complaint, relying exclusively on this Court's decision in Feres.

The Court of Appeals for the Eleventh Circuit reversed. 749 F.2d 1530 (1985). It noted the language of Feres that precludes suits by service members against the Government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S., at 146, 95 L.Ed. 152, 71 S.Ct. 153. The court found, however, that the evolution of the doctrine since the Feres decision warranted a qualification of the original holding according to the status of the alleged tortfeasor. The court identified what it termed "the typical Feres factual

paradigm" that exists when a service member alleges negligence on the part of another member of the military. 749 F.2d, at 1537. "[W]hen the Feres factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service." Ibid. But when negligence is alleged on the part of a Federal Government employee who is not a member of the military, the court found that the propriety of a suit should be determined by examining the rationales that underlie the Feres doctrine. Although it noted that this Court has articulated numerous

rationales for the doctrine,[2/] it found the effect of a suit on military discipline to be the doctrine's primary justification.

Applying its new analysis to the facts of this case, the court found "absolutely no hint . . . that the conduct of any alleged tortfeasor even remotely connected

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2/ We have identified three factors that underlie the Feres doctrine:

"First, the relationship between the Government and members of its Armed Forces is " 'distinctively federal in character,' "; it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor . . . [is] '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . .' " Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-672, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977) (citations omitted).

to the military will be scrutinized if this case proceeds to trial." 749 F.2d, at 1539. Accordingly, it found that Feres did not bar respondent's suit. The court acknowledged that the Court of Appeals for the Ninth Circuit, "in a case strikingly similar to this one, has reached the opposite conclusion." 749 F.2d, at 1539. (citing Uptegrove v. United States, 600 F.2d 1248 (1979), cert. denied, 444 U.S. 1044, 62 L.Ed.2d 730, 100 S.Ct. 732 (1980)).[3/] It concluded, however, that "Uptegrove was wrongly decided," 749 F.2d, at 1539. and declined to reach the same result.

3/ In Uptegrove, the wife of a Navy lieutenant killed while flying home on an Air Force C-141 transport brought suit against the Government under the FTCA, alleging negligence on the part of three FAA air traffic controllers. The court in Uptegrove dismissed the suit on the basis of Feres.

The Court of Appeals granted the Government's suggestion for rehearsing en banc. The en banc court found that this Court's recent decision in United States v. Shearer, 473 U.S. 52, 87 L.Ed.2d 38, 105 S.Ct. 3039 (1985) "reinforc[ed] the analysis set forth in the panel opinion," 779 F.2d 1492, 1493 (1986) (per curiam), particularly the "[s]pecial emphasis . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions," id., at 1493-1494. It concluded that the panel properly had evaluated the claim under Feres and therefore reinstated the panel opinion. Judge Johnson, joined by three other judges, strongly dissented. The dissent rejected the "Feres factual paradigm" as identified by the court, finding that because "Johnson's injury was undoubtedly

sustained incident to service, . . . under current law our decision ought to be a relatively straightforward affirmance." Id., at 1494.

We granted certiorari, 479 U.S. ___, 93 L.Ed.2d 19, 107 S.Ct. 59 (1986), to review the Court of Appeals' reformulation of the Feres doctrine and to resolve the conflict among the Circuits on the issue.[4/] We now reverse.

II

[1b, 3a] In Feres, this Court held that service members cannot bring tort suits against the Government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S.,

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4/ In addition to the decision of the Court of Appeals for the Ninth Circuit in Uptegrove, specifically acknowledged by the Court of Appeals in this case, the decision conflicts in principle with the decisions of the Courts of Appeals cited infra, n 8.

at 146 95 L.Ed. 152, 71 S.Ct. 153. This Court has never deviated from this characterization of the Feres bar.[5/] Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in Feres, Congress "possesses a ready remedy" to alter a misinterpretation of its intent. Id., at 138, 95 L.Ed. 152, 71 S.Ct. 153.[6/] Although all of the cases decided by this Court under Feres have involved allegations of negligence on the

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5/ See United States v. Brown, 348 U.S. 110, 112, 99 L.Ed. 139, 75 S.Ct. 141 (1954); United States v. Muniz, 374 U.S. 150, 159, 10 L.Ed.2d 805, 83 S.Ct. 1850 (1963); Stencel Aero Engineering Corp. v. United States, supra, at 671, 52 L.Ed.2d 665, 97 S.Ct. 2054; Chappell v. Wallace, 462 U.S. 296, 299, 76 L.Ed.2d 586, 103 S.Ct. 2362 (1983); United States v. Shearer, 473 U.S. 52, 57, 87 L.Ed.2d 38, 105 S.Ct. 3039 (1985).

6/ Congress has recently considered, but not enacted, legislation that would allow service members to bring medical malpractice suits against the Government. See HR 1161, 99th Cong., 1st Sess. (1985); HR 1942, 98th Cong., 1st Sess. (1983).

part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine.[7/] Nor have the lower courts

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7/ In two places in the Feres opinion, the Court suggested that the military status of the tortfeasor might be relevant to its decision. First, the Court identified "[t]he common fact underlying the three cases" as being "that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." 340 U.S., at 138, 95 L.Ed. 152, 71 S.Ct. 153 (emphasis added). Second, in discussing one of several grounds for the holding, the Court stated: "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control." Id., at 143, 95 L.Ed. 152, 71 S.Ct. 153 (emphasis added). Nevertheless, the language of the opinion, viewed as a whole, is broad: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving," id., at 141, 95 L.Ed. 152, 71 S.Ct. 153 (emphasis added) (footnote omitted); " '. . . To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.' " Id., at 143-144, 95 L.Ed.

understood this fact to be relevant under Feres.[8/] Instead, the Feres doctrine has

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152, 71 S.Ct. 153 (quoting United States v Standard Oil Co. 332 U.S. 301, 305-306, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947)) (emphasis added) (citations omitted). See id., at 142, 95 L.Ed. 152, 71 S.Ct. 153 (finding relevant "the status of both the wronged and the wrongdoer") (emphasis added).

Although one decision since Feres noted the military status of the tortfeasors, see United States v. Brown, supra, at 112, 99 L.Ed. 139, 75 S.Ct. 141, it did not rely on that fact. See 348 U.S., at 113, 99 L.Ed. 139, 75 S.Ct. 141 ("We adhere . . . to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty"). Moreover, it is the broad language that consistently has been repeated in recent decisions describing the Feres doctrine. See Chappell v. Wallace, supra, at 299, 76 L.Ed.2d 586, 103 S.Ct. 2362 ("Congress did not intend to subject the Government to . . . claims [for injuries suffered by a soldier in service] by a member of the Armed Forces") (emphasis added); Stencel Aero Engineering Corp. v. United States, supra, at 669, 52 L.Ed.2d 665, 97 S.Ct. 2054 (In Feres . . . the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United States under the Federal Tort Claims Act") (emphasis added); Dalehite v. United States, 346 U.S. 15, 31, n 25, 97 L.Ed. 1427, 73 S.Ct. 956 (1953) (characterizing the Feres cases as involving "injuries . . . allegedly caused by negligence of employees of the United States) (emphasis added).

8/ The list of cases compiled by the dissent in this case, 779 F.2d 1492, 1495-1496 (1986), in

been applied consistently to bar all suits

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which the lower courts have interpreted Feres to bar suit against the Government even though the negligence alleged was on the part of a civilian employee is worth repeating: Potts v. United States, 723 F.2d 20 (CA6 1983) (Navy corpsman injured when struck by a broken cable from a hoist operated by civilians), cert denied, 466 U.S. 959, 80 L.Ed.2d 555, 104 S.Ct. 2172 (1984); Warner v. United States, 720 F.2d 837 (CA5 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian Government employee); Jaffee v United States, 663 F.2d 1226 (CA3 1981) (serviceman injured by radition exposure allegedly due in part to intentional tort of civilian Department of Defense employees), cert denied, 456 U.S. 972, 72 L.Ed.2d 845, 102 S.Ct. 2234 (1982); Lewis v. United States, 663 F.2d 889 (CA9 1981) (Marine Corps pilot killed in crash allegedly due to negligence of Government maintenance employees), cert denied, 457 U.S. 1133, 73 L.Ed.2d 1350, 102 S.Ct. 2959 (1982); Carter v. Cheyenne, 649 F.2d 827 (CA10 1981) (Air Force captain killed in plane crash allegedly due to negligence of civilian flight instructor employed by military flight club), cert denied, 445 U.S. 904, 63 L.Ed.2d 320, 100 S.Ct. 1080 (1980); Uptegrove v. United States, 600 F.2d 1248 (CA9 1979) (See n 2, supra), cert. denied, 444 US 1044, 62 L.Ed.2d 730, 100 S.Ct. 732 (1980); Watkins v. United States, 462 F.Supp 980 (S.D. Ga 1978) (serviceman killed on base when motorcycle collided with shuttle bus driven by civilian Government employee), aff'd, 587 F.2d 279 (CA5 1979); Hass v. United States, 518 F.2d 1138 (CA4 1975) (suit by serviceman against civilian manager of military-owned horse stable); United States v. Lee, 400 F.2d 558 (CA9 1968) (serviceman killed in crash of military aircraft allegedly due to FAA air traffic controller negligence), cert denied,

on behalf of service members against the Government based upon service-related injuries. We decline to modify the doctrine at this late date.9/

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393 U.S. 1053, 21 L.Ed.2d 695, 89 S.Ct. 691 (1969); Sheppard v. United States, 369 F.2d 272 (CA3 1966) (same), cert denied, 386 U.S. 982, 18 L.Ed.2d 230, 87 S.Ct. 1286 (1967); Layne v. United States, 295 F.2d 433 (CA7 1961) (National Guardsman killed on training flight allegedly due to negligence of civilian air traffic controllers), cert denied, 368 US 990, 7 L.Ed.2d 527, 82 S.Ct. 605 (1962); United Air Lines, Inc., v. Wiener, 335 F.2d 379 (CA9) (serviceman injured in part due to alleged CAA employee negligence), cert dismissed sub nom, United Air lines, Inc., v. United States, 379 U.S. 951, 13 L.Ed.2d 549, 85 S.Ct. 452 (1964).

9/ Justice Scalia indicates that he would consider overruling Feres had this been requested by counsel, but in absence of such a request he would "confine the unfairness and irrationality [of] that decision" to cases where the allegations of negligence are limited to other members of the military. Post, at ___, 95 L.Ed.2d ___. In arguing "unfairness" in this case, Justice Scalia assumes that had respondent been "piloting a commercial helicopter" his family might recover substantially more in damages than it now may recover under the benefit programs available for a serviceman and his family. Post, at ___, 95 L.Ed.2d ___. It hardly need be said that predicting the outcome of any damage suit--both with respect to liability and the amount of damages--is hazardous, whereas veterans' benefits are guaranteed by law. Post, at ___, 95 L.Ed.2d ___. If "fairness"--in terms of pecuniary benefits--were

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[3b] This Court has emphasized three broad rationales underlying the Feres decision. See Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-673, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977), and n 2, supra. An examination of these reasons for the doctrine demonstrates that the status of the alleged tortfeasor does not have the critical significance ascribed to it by the Court of Appeals in this case. First, "[t]he relationship between the Government and members of its

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the issue, one could respond to the dissent's assumption by noting that had the negligent instructions that led to Johnson's death been given by another serviceman, the consequences--under the dissent's view--would be equally "unfair." "Fairness" provides no more justification for the line drawn by the dissent than it does for the line upon which application of the Feres doctrine has always depended: whether the injury was "incident to service"? In sum, the dissent's argument for changing the interpretation of a congressional statute, when Congress has failed to do so for almost 40 years, is unconvincing.

armed forces is 'distinctively federal in character.' " Feres, 340 U.S. at 143, 95 L.Ed. 152, 71 S.Ct. 153 (quoting United States v. Standard Oil Co., 332 U.S. 301, 305, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947). This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a "[s]ignificant risk of accidents and injuries." Stencel Aero Engineering Corp. v. United States, supra, at 672, 52 L.Ed.2d 665, 97 S.Ct. 2054. Where a service member is injured incident to service--that is, because of his military relationship with the Government--it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to

[the] serviceman." Ibid. Instead, application of the underlying federal remedy that provides "simple, certain, and uniform compensation for injuries or death of those in armed services," Feres, supra, at 144, 95 L.Ed. 152, 71 S.Ct. 153 (footnote omitted), is appropriate.

[3c] Second, the existence of these generous statutory disability and death benefits is an independent reason why the Feres doctrine bars suit for service-related injuries.[10/] In Feres, the Court observed that the primary purpose of the FTCA "was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for,

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10/ Service members receive numerous other benefits unique to their service status. For example, members of the military and their dependents are eligible for educational benefits, extensive health benefits, home-buying loan benefits, and retirement benefits after a minimum of 20 years of service. See generally Uniformed Services Almanac (L. Sharff & S. Gordon eds. 1985).

it appears to have been unintentional." 340 U.S., at 140, 95 L.Ed. 152, 71 S.Ct. 153. Those injured during the course of activity incident to service not only receive benefits that "compare extremely favorably with those provided by most workmen's compensation statutes," id., at 145, 95 L.Ed. 152, 71 S.Ct. 153, but the recovery of benefits is "swift [and] efficient," Stencel Aero Engineering Corp. v. United States, supra, at 673, 52 L.Ed.2d 665, 97 S.Ct. 2054, "normally requir[ing] no litigation," Feres, supra, at 145, 95 L.Ed. 152, 71 S.Ct. 153. The Court in Feres found it difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA. Particularly persuasive was the fact that Congress "omitted any

provision to adjust these two types of remedy to each other." Id., at 144, 95 L.Ed. 152, 71 S.Ct. 153. Congress still has not amended the Veterans' Benefit Act or the FTCA to make any such provision for injuries incurred during the course of activity incident to service. We thus find no reason to modify what the Court has previously found to be the law: the statutory veterans' benefits "provid[e] an upper limit of liability for the Government as to service-connected injuries." Stencel Aero Engineering Corp. v. United States, supra, at 673, 52 L.Ed.2d 665, 97 S.Ct. 2054. See Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464, 62 L.Ed.2d 614, 100 S.Ct. 647 (1980) (per curiam) ("[T]he Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress

intended to be the sole remedy for service-connected injuries").

[1c, 3d] Third, Feres and its progeny indicate that suits brought by service members against the Government for injuries incurred incident to service are barred by the Feres doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." United States v. Shearer, 473 U.S., at 59, 87 L.Ed.2d 38, 105 S.Ct. 3039 (emphasis in original). In every respect the military is, as this Court has recognized, "a specialized society," Parker v. Levy, 417 U.S. 733, 743, 41 L.Ed.2d 439, 94 S.Ct. 2547 (1974). "[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and espirit de corps."

Goldman v. Weinberger, 475 U.S. ___, ___, 89 L.Ed.2d 478, 106 S.Ct. 1310 (1986). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military missions.[11/] Moreover, military discipline involves not only obedience to order, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for

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11/ [1d] Civilian employees of the Government also may play an integral role in military activities. In this circumstance, an inquiry into the civilian activities would have the same effect on military discipline as a direct inquiry into military judgments. For example, the FAA and the United States Armed Services have an established working relationship that provides for FAA participation in numerous military activities. See FAA, United States Dept. of Transportation, Handbook 7610.4F: Special Military Operations (Jan. 21, 1981).

service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

B

[2b] In this case, Lieutenant Commander Johnson was killed while performing a rescue mission on the high seas, a primary duty of the Coast Guard. See 14 U.S.C. §§2, 88(a)(1) [14 U.S.C.S. §§2, 88(a)(1)].[12/] There is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity incident to his military service. Johnson went on the rescue mission specifically because of his military

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12/ [2c] The Coast Guard, of course, is a military service, and an important branch of the armed services. 14 U.S.C. §1[14 U.S.C.S. §1].

status. His wife received and is continuing to receive statutory benefits on account of his death. Because Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case thus fall within the heart of the Feres doctrine as it consistently has been articulated.

III

[1e, 2d] We reaffirm the holding of Feres that "The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S., at 146, 95 L.Ed. 152, 71 S.Ct. 153. Accordingly, we reverse the judgement of the Court of Appeals for the Eleventh

Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice **Scalia**, with whom Justice **Brennan**, Justice **Marshall**, and Justice **Stevens** join, dissenting.

As it did almost for decades ago in Feres v. United States, 340 U.S. 135, 95 L.Ed. 152, 71 S.Ct. 153 (1950), the Court today provides several reasons why Congress might have been wise to exempt from the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 [28 U.S.C.S. §§ 1346(b), 2671-2680], certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it. We have not been asked by the respondent here to overrule Feres; but I can perceive no reason to accept the petitioner's invitation to extend it as the Court does today.

I

Much of the sovereign immunity of the United States was swept away in 1946 with passage of the FTCA, which renders the Government liable

> "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) [28 U.S.C.S. § 1346(b)].

Read as it is written, this language renders the Unites States liable to all persons, including servicemen, injured by the negligence of government employees. Other provisions of the Act set forth a number of exceptions, but none generally precludes FTCA suits brought by service-

men. One, in fact, excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war," § 2680(j) (emphasis added), demonstrating that Congress specifically considered, and provided what it thought needful for, the special requirements of the military. There was no proper basis for us to supplement--i.e., revise--that congressional disposition.

In our first encounter with the FTCA suit brought by a serviceman, we gave effect to the plain meaning of the statute. In Brooks v. United States, 337 U.S. 49, 93 L.Ed. 1200, 69 S.Ct. 918 (1949), military personnel had been injured in a collision with an Army truck while off duty. We rejected the Government's argument that those injured while enlisted in the military can never

recover under the FTCA. We noted that the Act gives the District Courts "jurisdiction over any claim founded on negligence brought against the Unites States" and found that the Act's exceptions "too lengthy, specific, and close to the present problem" to permit an inference that, notwithstanding the literal language of the statute, Congress intended to bar all suits brought by servicemen. Id., at 51, 93 L.Ed.1200, 69 S.Ct. 918. Particularly in light of the exceptions for claims arising our of combatant activities, 28 U.S.C. § 2680(j) [28 U.S.C.S. §2680(k), we said, "[i]t would be absurd to believe that Congress did not have the servicemen in mind" in passing the FTCA. 337 U.S., at 51, 93 L.Ed. 1200, 69 S.Ct. 918. We therefore concluded that the plaintiffs in Brooks could sue under the Act. In dicta, how-

ever, we cautioned that an attempt by a servicemen to recover for injuries suffered "incident to . . . service" would present "a wholly different case," id., at 52, 93 L.Ed. 1200, 69 S.Ct. 918, and that giving effect to the "literal language" of the FTCA in such a case might lead to results so "outlandish" that recovery could not be permitted, id., at 53, 93 L.Ed. 1200, 69 S.Ct. 918.

That "wholly different case" reached us one year later in Feres. We held that servicemen could not recover under the FTCA for injuries that "arise out of or are in the course of activity incident to service," 340 U.S., at 146, 95 L.Ed. 152, 71 S.Ct. 153, and gave three reasons for our holding. First, the parallel private liability required by the FTCA was absent. Id., at 141-142, 95 L.Ed. 152, 71 S.Ct. 153. Third, Congress could not have

intended to make FTCA suits available to servicemen who have already received veterans' benefits to compensate for injuries suffered incident to service. Id., at 144-145, 95 L.Ed. 152, 71 S.Ct. 153. Several years after Feres we thought of a fourth rationale: Congress could not have intended to permit suits for service-related injuries because they would unduly interfere with military discipline. United States v. Brown, 348 U.S. 110, 112, 99 L.Ed. 139, 75 S.Ct. 141 (1954).

In my view, none of these rationales justifies the result. Only the first of them, the "parallel private liability" argument, purports to be textually based, as follows: The United States is liable under the FTCA "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674 [28 U.S.C.S. §2674]; since no

"private individual" can raise an army, and since no State has consented to suits by members of its militia, § 2674 shields the Government from liability in the Feres situation. 340 U.S., at 141-142, 95 L.Ed. 152, 71 S.Ct. 153. Under this reasoning, of course, many of the Act's exceptions are superfluous, since private individuals typically do not, for example, transmit postal matter, 28 U.S.C. § 2680(b) [28 U.S.C.S. §2680(b)], collect taxes or customs duties, § 2680(c), impose quarantines, §2608(f), or regulate the monetary system, §2680(i). In any event, we subsequently recognized our error and rejected Feres's "parallel private liability" rationale. See Rayonier, Inc. v. United States, 352 U.S. 315, 319, 1 L.Ed.2d 354, 77 S.Ct. 374 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66-69, 100 L.Ed. 48, 76 S.Ct. 122 (1955).

Perhaps without that scant (and subsequently rejected) textual support, which could be pointed to as the embodiment of the legislative intent that its other two rationales speculated upon, the Feres Court would not as an original matter have reached the conclusion that it did. Be that as it may, the speculation outlived the textual support, and the Feres rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended. They are bad estimations at that. The first of them, Feres's second rationale, has barely escaped the fate of the "parallel private liability" argument, for though we have not yet acknowledged that it is erroneous we have described it as "no longer controlling." United States v. Shearer, 473 U.S. 52, 58 n 4, 87 L.Ed.2d 38, 105 S.Ct. 3039 (1985). The

rationale runs as follows: Liability under the TRCA depends upon "The law of the place where the [negligent] act or omission occurred," 28 U.S.C. § 1346(b) [28 U.S.C.S. § 1346(b)]; but Congress could not have intended local, and therefore geographically diverse, tort law to control important aspects of the "distinctively federal" relationship between the United States and enlisted personnel. 340 U.S., at 142-144, 95 L.Ed. 152, 71 S.Ct. 153. Feres itself was concerned primarily with the unfairness to the soldier of making his recovery turn upon where he was injured, a matter outside of his control. Id., at 142-143, 95 L.Ed. 152, 71 S.Ct. 153. Subsequent cases, however, have distressed the military's need for uniformity in its governing standards. See, e.g., Stencel Aero Engineering Corp. v. United States,

431 U.S. 666, 672, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977). Regardless of how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA.

The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery. See United States v. Muniz, 374 U.S. 150, 162, 10 L.Ed.2d 805, 83 S.Ct. 1850 (1963). We have abandoned this peculiar rule of solicitude in allowing federal prisoners (who have no more control over their geographical location than servicemen) to recover under the TRCA for injuries caused by the negligence of prison authorities.

See ibid. There seems to me nothing "unfair" about a rule which says that, just as a serviceman injured by a negligent civilian must resort to state tort law, so must a serviceman injured by a negligent government employee.

To the extent that the rationale rests upon the military's need for uniformity, it is equally unpursuasive. To begin with, that supposition of congressional intent is positively contradicted by the text. Several of the FTCA's exemptions show that Congress considered the uniformity problem, see, e.g., 28 U.S.C. §§ 2608(b), 2680(i), 2680(k) [28 U.S.C.S. §§ 2680(b), 2680(i), 2680(k)], yet it chose to retain sovereign immunity for only some claims affecting the military. § 2680(j). Moreover, we have effectively disavowed the "uniformity" justification--and rendered its benefits to military

planning illusory--by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting civilians to recover the injuries caused by military negligence. See, e.g., Indian Towing Co. v. United States, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct. 122 (1955). Finally, it is difficult to explain why uniformity (assuming our rule were achieving it) is indispensable for the military, but not for the many other federal departments and agencies that can be used under the FTCA for the negligent performance of their "unique, nationwide functions[s]," Stencel Aero Engineering Corp. v. United States, supra, at 675, 52 L.Ed.2d 665, 97 S.Ct. 2054 (Marshall, J., dissenting), including, as we have noted, the federal prison system which may be sued under varying state laws by its inmates. See United

States v. Muniz, supra. In sum, the second Feres rationale, regardless of how it is understood, is not a plausible estimation of congressional intent, much less a justification for importing that estimation, unwritten, into the statute.

Feres's third basis has similarly been denominated "no longer controlling." United States v. Shearer, supra, at 58, n 4, 87 L.Ed.2d 38,- 105 S.Ct. 3039. Servicemen injured or killed in the line of duty are compensated under the Veterans' Benefits Act (VBA), 72 Stat 1118, as amended, 38 U.S.C. § 301 et seq. (1982 ed and Supp III) [38 U.S.C.S. §§ 301 et seq.], and the Feres Court thought it unlikely that Congress meant to permit additional recovery under the FTCA, 340 U.S., at 144-145, 95 L.Ed. 152, 71 S.Ct. 153. Feres described the absence of any provision to adjust dual recoveries under

the FTCA and VBA as "persuasive [evidence] that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." Id., at 144, 95 L.Ed. 152, 71 S.Ct. 153. Since Feres we have in dicta characterized recovery under the VBA as "The sole remedy for service-connected injuries," Hatzlachh Supply Co. v. United States, 444 U.S. 460, 464, 62 L.Ed.2d 614, 100 S.Ct. 647 (1980) (per curiam), and have said that the VBA "provides an upper limit of liability for the Government" for those injuries, Stencel Aero Engineering Corp v. United States, supra, at 673, 52 L.Ed.2d 665, 97 S.Ct. 2054.

The credibility of this rationale is undermined severely by the fact that both before and after Feres we permitted injured servicemen to bring FTCA suits, even though they had been compensated

under the VBA. In Brooks v. United States, 337 U.S. 49, 93 L.Ed. 1200, 69 S.Ct. 918 (1949), we held that two servicemen injured off duty by a civilian Army employee could sue the Government. The fact that they had already received VBA benefits troubled us little. We pointed out that "nothing in the Tort Claims Act or the veterans' laws . . . provides for exclusiveness of remedy . . . exclusive . . . when Congress has not done so." Id., at 53, 93 L.Ed. 1200, 69 S.Ct. 918. We noted further that Congress had included three exclusivity provisions in FTCA, 28 U.S.C. §§2672, 2676, 2679 [28 U.S.C.S. §§ 2672, 2676, 2679], but had said nothing about servicemen plaintiffs, 337 U.S., at 53, 93 L.Ed. 1200, 69 S.Ct. 918. We indicated, however, that VBA compensation could be taken into account in adjusting recovery under the FTCA.

Id., at 53-54, 93 L.Ed. 1200, 69 S.Ct. 918; see also United States v. Brown, 348 U.S., at 111, and n*, 99 L.Ed. 139, 75 S.Ct. 1441. That Brooks remained valid after Feres was made clear in United States v. Brown, supra, in which we stressed again that because "Congress had given no indication that it made the right to compensation [under the VBA] the veteran's exclusive remedy, . . . the receipt of disability payments . . . did not preclude recovery under the Tort Claims Act." Id., at 113, 99 L.Ed. 139, 75 S.Ct. 141.

Brooks and Brown (neither of which has ever been expressly disapproved) plainly hold that the VBA is not an "exclusive" remedy which places an "upper limit" on the Government's liability. Because of Feres and today's decision, however, the

VBA will in fact be exclusive for service-connected injuries, but not for others. Such a result can no more be reconciled with the text of VBA than with that of FTCA, since the VBA compensates servicemen without regard to whether their injuries occur "incident to service" as Feres defines that term. See 38 U.S.C. § 105 [38 U.S.C.S. § 105]. Moreover, the VBA is not, as Feres assumed, identical to federal and state workers' compensation statutes in which exclusivity provisions almost invariably appear. See, e.g., 5 U.S.C. § 8116(c) [5 U.S.C.S. § 8116(c)]. Recovery is possible under workers' compensation statutes more often than under the VBA, and VBA benefits can be terminated more easily than can workers' compensation. See Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich.L.Rev.

1099, 1106-1108 (1979). In sum, "The presence of an alternative compensation system [neither] explains [n]or justifies the Feres doctrine; it only makes the effect of the doctrine more palatable." Hunt v. United States, 204 U.S.App. DC? 308, 326, 636 F.2d 580, 598 (1980).

The foregoing three rationales--the only ones actually relied upon in Feres--are so frail that it is hardly suprising that we have repeatedly cited the later-conceived-of "military discipline" rationale as the "best" explanation for that decision. See United States v. Shearer, 473 U.S., at 57, 87 L.Ed.2d 586, 103 S.Ct. 2362 (1983); United States v. Muniz, 374 U.S. at 162, 10 L.Ed.2d 805, 83 S.Ct. 1850. Applying the FTCA as written would lead, we have reasoned, to absurd results, because if suits could be brought on the basis of alleged negligence towards

a serviceman by other servicemen, military discipline would be undermined and civilian courts would be required to second-guess military decision making. See Stencel Aero Engineering Corp. v. United States, 431 U.S., at 671-672, 673, 52 L.Ed.2d 665, 97 S.Ct. 2054. (Today the Court goes further and suggests that permitting enlisted men and women to sue their Government on the basis of negligence towards them by any government employee seriously undermines "duty and loyalty to one's service and to one's country." Ante, at ---, 95 L.Ed.2d 659.) I cannot deny the possibility that some suits brought by servicemem will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain,

or so certainly substantial, that we are justified in holding) that Congress did not mean what it plainly said in the statute before us.

It is strange that Congress' "obvious" intention to preclude Feres suits because of their effect on military discipline was discerned neither by the Feres Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of Feres suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. See Bennett, the Feres Doctrine, Discipline, and the Weapons of War, 29 St. Louis ULJ 383, 407-411 (1985). Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military

discipline, such as claims based upon combat command decisions, 28 U.S.C. § 2680(j) [28 U.S.C.S. § 2680(j)]; claims based upon performance of "discretionary" functions, § 2680(a); claims arising in foreign countries, § 2680(k); international torts, § 2680(h); and claims based upon the execution of a statute or regulation, § 2680(a). Or perhaps Congress assumed that, since liability under the FTCA is imposed upon the Government, and not upon individual employees, military decision making was unlikely to be affected greatly. Or perhaps--most fascinating of all to contemplete--Congress thought that barring recovery by servicemen might adversely affect military discipline. After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and

children will receive only a fraction of the amount they might have recovered had he been piloting a commercial helicopter at the time of his death.

To the extent that reading the FTCA as it is written will require civilian courts to examine military decision making and thus influence military discipline, it is outlandish to consider that result "outlandish," Brooks v. United States, 337 U.S., at 53, 93 L.Ed. 1200, 69 S.Ct. 918, since in fact it occurs frequently, even under the Feres dispensation. If Johnson's helicopter had crashed into a civilian's home, the home-owner could have brought an FTCA suit that would have invaded the sanctity of military decision making no less than respondents'. If a soldier is injured not "incident to service," he can sue his Government regardless of whether the alleged

negligence was military negligence. And if a soldier suffers service-connected injury because of the negligence of a civilian (such as the manufacturer of an airplane), he can sue that civilian, even if the civilian claims contributory negligence and subpoenas the serviceman's colleagues to testify against him.

In sum, neither the three original Feres reasons nor the post hoc rationalization of "military discipline" justifies our failure to apply the FTCA as written. Feres was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received. In re "Agent Orange" Product Liability Litigation, 580 F.Supp 1242, 1246 (E.D.N.Y.) appeal dism'd, 745 F.2d 161 (CA2 1984).*/

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*/ See, e.g., Sanchez v. United States, 813 F,2d 593, --- CA (1982); Bozeman v. United States, 780

II

The Feres Court claimed its decision was necessary to make "The entire statutory system of remedies against the Government . . . a workable, consistent and equitable whole." 340 U.S., at 139, 95

F.2d 198, 200 (CA2 1985); Hinkie v. United States, 715 F.2d 96, 97 (CA3 1983), cert. denied, 465 U.S. 1023, 79 L.Ed.2d 680, 104 S.Ct. 1276 (1984); Mondelli v. United States, 711 F.2d 567, 569 (CA3), cert. denied, 465 U.S. 1021, 79 L.Ed.2d 677, 104 S.Ct. 1272 (1984); Scales v. United States, 685 F.2d 970, 974 (CA5 1982), cert. denied, 460 U.S. 1082, 76 L.Ed.2d 344, 103 S.Ct. 1772 (1983); LaBash v. United States Dept. of Army, 668 F.2d 1153, 1156 (CA10), cert. denied, 456 U.S. 1008, 73 L.Ed.2d 1303, 102 S.Ct. 1999 (1982); Monaco v. United States, 661 F.2d 129, 132 CA9 1981), cert. denied, 456 U.S. 989, 73 L.Ed.2d 1284, 102 S.Ct. 2269 (1982); Hunt v. United States, 204 U.S.App. DC 308, 317, 636 F.2d 580, 589 (1980); Veillette v. United States, 615 F.2d 505, 506 (CA9 1980); Parker v. United States, 611 F.2d 1007, 1011 (CA5 1980); Peluso v. United States, 474 U.S. 879, 38 L.Ed.2d 124, 94 S.Ct. 50 (1973); Bennett, the Feres Doctrine, Discipline, and The Weapons of War, 29 St. Louis U.L.J. 383 (1985); Hitch, the Federal Tort Claims Act and Military Personnel, 8 Rutgers L Rev 316 (1954); Rhodes, the Feres Doctrine After Twenty-Five Years, 18 AFL Rev 24 (Spring 1976); Note, 51 J Air L & Com 1087 (1986); Note, 6 Cardozo L Rev 391 (1984); Note, 77 Mich L Rev 1099 (1979); Note, 43 St. John's L Rev 455 (1969).

L.Ed. 152, 71 S.Ct. 153. I am unable to find such beauty in what we have wrought. Consider the following hypothetical (similar to one presented by Judge Weinstein in In re "Agent Orange" Product Liability Litigation, supra, at 1252): A serviceman is told by his superior officer to deliver some paper to the local United States Courthouse. As he nears his destination, a wheel on his government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the Courthouse that day) and a United States marshal on duty. Under our case law and federal statutes, the serviceman may not sue the Government (Feres); the guard may not sue the Government (because of the exclusivity provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116 [5 U.S.C.S. § 8116]); the daughter may not

sue the Government for the loss of her father's companionship (Feres), but may sue the Government for her own injuries (FTCA). The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship. The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit (United State v. Yellow Cab Co., 340 U.S. 543, 95 L.Ed. 523, 71 S.Ct. 399 (1951) and in the guard's suit (Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 74 L.Ed.2d 911, 103 S.Ct. 1033 (2983)), even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may not implead the Government in the serviceman's

suit (Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 52 L.Ed.2d 665, 97 S.Ct. 2054 (1977)), even though the serviceman was compensated under a statute that does not contain an exclusivity provision (VBA).

The point is not that all of these inconsistencies are attributable to Feres (though some of them assuredly are), but merely that bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written. When confusion results from our applying the unambiguous text of a statute, it is at least a confusion validated by the free play of the democratic process, rather than what we have here: unauthorized rationalization gone wrong. We realized seven years too late that "[t]here is no justification for this Court to read

exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Rayonier, Inc. v United States, 352 U.S., at 320, 1 L.Ed.2d 354, 77 S.Ct. 374 (footnote omitted).

I cannot take comfort, as the Court does, ante, at ----- - -----, 95 L.Ed.2d 655, and n 6, from Congress' failure to amend the FTCA to overturn Feres. The unlegislated desires of later Congresses with regard to one thread in the fabric of the Federal Tort Claims Act could hardly have any bearing upon the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946. And even if they could, intuiting those desires from congressional failure to act is an uncertain enterprise which takes as its starting point disregard of the checks and

balances in the constitutional scheme of legislation designed to assure that not all desires of a majority of the Legislature find their way into law.

We have not been asked by the respondents to overrule Feres, and so need not resolve whether considerations of stare decisis should induce us, despite the plain error of the case, to leave bad enough alone. As the majority acknowledges, however, "all of the cases decided by this Court under Feres have involved allegations of negligence on the part of members of the military." Ante, at ----, 95 L.Ed.2d 655. I would not extend Feres any further. I confess that the line between FTCA suits alleging military negligence and those alleging civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in Feres and confine the

unfairness and irrationality that decision has bred. But that, I think, is justification enough.

Had Lieutenant Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving his country's armed forces, the Court today limits his family to a fraction of the recovery they might otherwise have received. If our imposition of that sacrifice bore the legitimacy of having been prescribed by the people's elected representatives, it would (insofar as we are permitted to inquire into such things) be just. But it has not been, and it is not. I respectfully dissent.

APPENDIX I

JOHNSON v. UNITED STATES
Cite as 771 F.2d 1492 (11th Cir. 1986)

Frieda Joyce JOHNSON, personal representative of the Estate of Horton Winfield Johnson, for herself and for the Benefit of Kevin Lee Nix, Cynthia Ann Johnson and Tamara Joyce Nix, Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 83-5764.

Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Jan. 13, 1986.

Widow brought wrongful death action against United Stated under Federal Tort Claims Act alleging that her husband, a helicopter pilot for United States Coast Guard dispatched to search for civilian boat, died as result of negligence of civilian Federal Aviation Administration

air traffic controllers who had assumed control over helicopter when inclement weather prevented visual navigation. The United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., granted Government's motion to dismiss. On appeal, the Court of Appeals, 749 F.2d 1530, reversed, and Government's suggestion that matter be reviewed by en banc court was granted, 760 F.2d 244. The Court of Appeals held that action was not barred by Feres doctrine.

Reversed.

Johnson, Circuit Judge, filed dissenting opinion in which Rodney, Tjoflat and Hill, Circuit Judges, joined.

United States 78(16).

Action for wrongful death of coast guard helicopter pilot, dispatched to search for civilian boat, as result of

alleged negligence of civilian Federal Aviation Administration air traffic controllers who had assumed control over helicopter when inclement weather prevented visual navigation was not barred by Feres doctrine. 28 U.S.C. §§ 1346, 2671-2680.

Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Joel D. Eaton, Miami, Fla., for plaintiffs-appellants.

Jeffrey D. Fisher, Sp. Asst. U.S. Atty., Linda Collins-Hertz, Jonathan Goodman, Asst. U.S. Attys., Miami, Fla., Robert S. Greenspan, Nicholas Stephen Zeppos, U.S. Dept. of Justice, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Florida.

JOHNSON v. UNITED STATES

Cite as 779 F.2d 1492 (11th Cir. 1986)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON AND CLARK, Circuit Judges.

PER CURIAM:

Frieda Joyce Johnson, respondent, brought this wrongful death action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680. She alleges that her husband, a helicopter pilot for the United States Coast Guard dispatched to search for a civilian boat, died as a result of the negligence of civilian Federal Aviation Administration air traffic controllers who had assumed control over the helicopter when inclement weather prevented visual navigation. The district court, relying on Feres v. United States, 340 U.S. 135,

71 S.Ct. 153, 95 L.Ed. 152 (1950), granted the government's motion to dismiss. The court of appeals reversed. 749 F.2d 1530 (11th Cir. 1985). On April 24, 1985, we granted the government's suggestion that this matter be reviewed by the en banc court. 760 F.2d 244 (11th Cir. 1985). Such action vacated the panel opinion. Upon consideration by the full court, the panel opinion found at 749 F.2d 1530 (11th Cir. 1985) is reinstated.

As noted in footnote 13 of the panel opinion, the Supreme Court granted certiorari in the case of Shearer v. United States, 723 F.2d 1102 (3rd Cir. 1983), cert. granted, ---U.S.---, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984). On June 27, 1985, the Court announced its opinion in that case, ---U.S.---, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985). The opinion of the Supreme Court is most helpful to our

decision herein and reinforces the analysis set forth in the panel opinion.

Shearer involved the death of an Army private, who, while off duty, was kidnapped and murdered by another serviceman who was also off duty and away from his base. The claim made under the Federal Tort Claims Act was that although the Army knew that the other serviceman was dangerous it negligently failed to control him or warn others about him. The government contended that the suit was barred by both 28 U.S.C. § 2680(h) (waiver of sovereign immunity under the Federal Tort Claims Act not applicable to claims arising out of assault and battery) and the Feres doctrine. Only four members of the Court found § 2680(h) applicable. Section II B of the opinion, which

discussed the Feres doctrine, was joined in by eight members of the Court (JusticePowell did not participate in the case).[1/]

1/ Section II B reads:

Our holding in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), was that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." Id., at 146, 71 S.Ct. at 159. Although the Court in Feres based its decision on several grounds, "[i]n the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'" United States v. Muniz, 374 U.S. 150, 162 [83 S.Ct. 1850, 1857, 10 L.Ed.2d 805] (1963), quoting United States v. Brown, 348 U.S. 110, 112 [75 S.Ct. 141, 143, 99 L.Ed. 139] (1954).

The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases. Here, the Court of Appeals places great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decision, see Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977), and

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whether the suit might impair essential military discipline, see Chappell v. Wallace, 462 U.S. 296, 300, 304,103 S.Ct. 2362, 2365, 2367, 76 L.Ed.2d 586 (1983).

Respondent's complaint strikes at the core of these concerns [footnote omitted]. In particular, respondent alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." App. 14. This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman [footnote omitted].

Respondent's case is therefore quite different from Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), where the Court allowed recovery under the Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers "to testify in court as to each other's decisions and actions." Stencel Aero Engineering Corp. v. United States, supra, 431 U.S. at 673, 97 S.Ct. at 2058. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions, for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in Chappell v. Wallace, such "complex, subtle, and professional decisions as to the composition, training . . . and control of a military force are essentially

Special emphasis is placed upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions. In Shearer, the Court concluded that the "[r]espondents complaint strikes at the core of these

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professional military judgments.'" 462 U.S., at 302, 103 S.Ct. at 2366 quoting Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973).

Finally, respondent does not escape the Feres net by focusing only on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." Tr. of Oral Arg. 37. By whatever name it is called, it is a decision of command. The plaintiffs in Feres and Stencel Aero Engineering did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the type of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondent's attempt to hale Army officials into court to account for their supervision and discipline of Private Heard must fail ---U.S. at ---, 105 S.Ct. at 3043-44.

concerns" and held the claims barred by the Feres doctrine. ---U.S. at ---, 105 S.Ct. at 3043 (footnote omitted).

Writing for the majority, the Chief Justice noted,

> "[t]he Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in Feres and subsequent cases."

Id. Following this command, we find that the panel opinion has given proper consideration to the Feres factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts involving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation)

who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the Feres preclusion.

The judgment of the district court is REVERSED.

JOHNSON, Circuit Judge, dissenting in which RONEY, TJOFLAT and HILL, Circuit Judges, join.

I respectfully dissent from the decision of this Court.

This case concerns a Coast Guard helicopter pilot who was killed while on a military mission in a crash allegedly caused by civilian FAA air controller negligence. Since the suit brought by this serviceman's survivor is against the United States, we are bound by the dictates of the Feres doctrine, which exempts

the government from suit where an injury to a serviceman is "incident to service." Here, Johnson's injury was undoubtedly sustained incident to service, so under current law our decision ought to be a relatively straightforward affirmance. However, the majority finds a novel way to evade the commands of the Supreme Court--and of Fifth Circuit precedent binding on this Court--in order to reverse and allow recovery.

In the panel opinion reinstated by the full court after en banc consideration, the majority determines that this Court henceforth will not make the standard Feres inquiry--whether or not the injury was incident to service--unless something that it calls "the Feres factual paradigm" is present. Johnson v. United States, 749 F.2d 1530, 1537 (11th Cir. 1985). That paradigm is said to be "an FTCA suit for

injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed forces." Id. Where the paradigm does not appear, this Court must now undertake a case-by-case assessment of each rationale behind the Feres doctrine to determine whether the suit in question would undercut the purposes of the FTCA. Id.

The majority appears to find grounds for this extraordinary methodology in a handful of cases in which courts have returned to the Feres rationales to examine novel situations. See Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983) (black servicemen barred from suing military for damages for constitutional violations); Stencel Aero Engineering v. United States, 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 655 (1977) (no third party indemnification from

United States where direct suit of injured party barred by Feres); United States v. Munitz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) (Feres does not bar prisoners' suits against United States for injuries sustained in federal prison); Hunt v. United States, 636 F.2d 580 (D.C. Cir. 1980) (manufacturer sued by servicemen injured by defective swine flu vaccine not barred by Feres from bringing in United States as substitute defendant under unique liability scheme of Swine Flu Act). The majority's own opinion suggests that it is undesirable to apply these rationales case-by-case in any but extremely unusual situations. Johnson, 749 F.2d at 1537 ("the [Feres] rationales are more relevant to the wisdom of implying [sic] an exception to the FTCA in the first instance, than they are to determining whether, given a particular

factual situation, a serviceman was injured 'incident to service'"). Compare Henninger v. United States, 473 F.2d 814 (9th Cir. 1973) ("[t]o determine the effect that a particular type of suit might have upon military discipline would be an exceedingly complex task . . . [N]early every case would have to be litigated, and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs").2/

2/ The Supreme Court in Shearer v. United States, ___U.S.___, 105 S.Ct. 3039, 3043, 87 L.Ed.2d 38 (1985), recently said, as the majority notes, that "[t]he Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute as it has been construed in Feres and subsequent cases." The majority seems to read this comment as condoning case-by-case application of the Feres rationales. This is too broad an interpretation. The bright-line rule that the Shearer Court specifically rejects is the use of "the situs of the murder" as determinative. Beyond this, the Court simply affirms that each case should be examined in light of the traditional application of the exception --not

However, cases in which a serviceman was injured incident to service by a civilian government employee are hardly novel. This fact pattern has appeared consistently over the years. And just as consistently, no court until now has allowed recovery against the government in this sort of suit. See Potts v. United States, 723 F.2d 20 (6th Cir. 1983), cert. denied, 466 U.S. 959, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984) (Navy corpsman injured when struck by broken cable from hoist operated by civilians); Warner v. United States, 720 F.2d 837 (5th Cir. 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian government employee); Jaffe v. United States, 663 F.2d 1226 (3rd Cir. 1981) (en banc), cert. denied, 456

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that each case should be scrutinized under each Feres rationale originally supporting the FTCA exception.

U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982) (serviceman injured by radiation exposure allegedly due in part to intentional tort of civilian Department of Defense and Atomic Energy Commission employees); Lewis v. United States, 663 F.2d 889 (9th Cir. 1981) (Marine Corps pilot killed in crash allegedly due to negligence of government maintenance employees); Carter v. Cheyenne, 649 F.2d 827 (10th Cir. 1981) (Air Force captain killed in crash at city airport for which city brought third-party claim against FAA controllers); Woodside v. United States, 606 F.2d 134 (6th Cir. 1979), cert. denied, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980) (Air Force officer killed in crash of plane allegedly due to negligence of civilian flight instructor employed by military flight club); Uptegrove v. United States, 600 F.2d 1248

(9th Cir. 1979), cert. denied, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980) (serviceman killed in crash of Air Force transport due to alleged negligence of FAA air traffic controllers); Watkins v. United States, 462 F.Supp. 980, aff'd on opinion below, 587 F.2d 279 (5th Cir. 1979) (serviceman a killed on base when motorcycle collided with shuttle bus driven by civilian government employee); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975) (Marine sued government, charging civilian managers of marine stable with negligence); Certain Underwriters at Lloyd's v. United States, 511 F.2d 159 (5th Cir. 1975) (suit by insurer of serviceman injured through malpractice of Public Health Service employees barred); Bankston v. United States, 480 F.2d 495 (5th Cir. 1973) (serviceman injured through Public Health

Service employee malpractice); United States v. Lee, 400 F.2d 558 (9th Cir. 1968) (serviceman killed in crash of military aircraft allegedly due to FAA air controller negligence); Sheppard v. United States, 369 F.2d 272 (3rd Cir. 1966), cert. denied, 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 230 (1967) (serviceman killed in crash of military aircraft allegedly due to FAA air controller negligence) (companion case to Lee, supra); Layne v. United States, 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990, 82 S.Ct. 605, 7 L.Ed.2d 527 (1962) (National Guardsman killed on training flight due to negligence of civilian air controllers); United Airlines v. Wiener, 335 F.2d 379 (9th Cir. 1964), cert. denied sub nom. United Airlines, Inc. v. United States, 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964) (serviceman injured in part due to CAA employee negligence).

These cases are consistent with the Supreme Court's opinion in Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), in which a serviceman was injured in an auto collision with a civilian employee of the Army. The civilian status of the tortfeasor was apparently immaterial to the Court's decision--the only question analyzed was whether the injury was "incident to service." See also Hass, 518 F.2d at 1141-42 n. 4 ("[i]n Brooks the Army truck that hit claimants' car was driven by a civilian, but the Supreme Court simply mentioned that fact in passing and placed no emphasis on it in reaching a decision").

The former Fifth Circuit cases cited above, Watkins, Certain Underwriters, and Bankston, are precedents binding on this Circuit. The majority unaccountably does

not trouble to distinguish, or even to discuss, these cases. Watkins, which involved a suit by a serviceman injured when his motorcycle collided with a shuttle bus driven by a civilian government employee, is particularly relevant. There, the former Fifth Circuit concluded that "the fact that the injury was inflicted by non-military personnel does not bar operation of the Feres doctrine." Watkins, 462 F.Supp. at 985. What was true for Watkins is no less true for Johnson.

But even if this court simply ignores precedent--even if we decline, as the Shearer Court enjoins us, to examine each case in the light of the statute as it has historically been construed and accept the majority's unprecedented case-by-case methodology--the decision of the court below should be affirmed. For this case

clearly would fall within the so-called "Feres factual paradigm" if the latter were properly framed.

In the cases considered by the Feres Court all three plaintiffs were injured by other servicemen. But the Court's holding was not limited to military tortfeasors. The Court said: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." Feres v. United States, 340 U.S. 135, 141, 71 S. Ct. 153, 157, 95 L.Ed.. 152 (1950) (emphasis added). The Court further confirmed in Stencel Aero Engineering Corp., 431 U.S. at 669, 97 S.Ct. at 2056 (emphasis added), that "[i]n Feres . . . the Court held that an on-duty serviceman who is injured due to the negligence of Government officials may not recover against the United under the

Federal Tort Claims Act." As the lower court in Sheppard noted, the Court's ruling in Feres contains "no reference, except as a mere statement of fact, to the military status of the primary tort-feasors, and certainly no reliance on that fact." Sheppard v. United States, 294 F.Supp. 7, 8 (E.D.Pa.1969), aff'd, 369 F.2d 272 (3rd Cir. 1966), cert. denied, 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 230 (1967).

An exception to the FTCA must logically cover all government employees, since that Act concerns claims based on "the negligent or wrongful act or omission of any employee of the Government." Tort Claims Act, 28 U.S.C. § 1346(b) (1976) (emphasis added). As the Ninth Circuit said in United States v. Lee, 400 F.2d at 562:

> In the ordinary Tort Claim case, where a person with

> civilian status is injured or dies, the claimant has his rights under the Tort Claims Act, regardless of the civilian or military status of the individual tortfeasor. An agen of the government has committed the wrong and the government is held liable. There is no logical distinction between the status of the civilian or the military tortfeasor.

In short, the true Feres factual paradigm is a case in which injury to a serviceman is caused by any government employee . This suit falls squarely within that paradigm. The proper inquiry remaining to this Court is simply whether or not this serviceman's injury was incident to service. Since Johnson was killed in the course of duty on a regular Coast Guard mission, I conclude that his death was indeed incident to service.

Supreme Court, U.S.
FILED
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No. 87-670

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM H. GILARDY, JR., SPECIAL ADMINISTRATOR OF THE ESTATE OF DAVID LEE THOMPSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners, the survivors of a service member who died incident to military service, contend that the United States is liable in damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, despite the rule of *Feres* v. *United States,* 340 U.S. 135 (1950).

Petitioners are the widow, parents, and administrator of the estate of Petty Officer David Lee Thompson. While on active duty as a crew member on the same Coast Guard helicopter involved in *United States* v. *Johnson,* No. 85-2039 (May 18, 1987), Thompson, along with Lieutenant Commander Johnson, was killed when, in the course of the rescue mission, the helicopter crashed. Like Johnson's survivors, petitioners brought suit under the FTCA seeking damages against the United States on the ground that the negligence of civiiian air traffic controllers employed by the Federal Aviation Administration caused the crash. The district court granted the government's motion to dismiss the complaint because Thompson's death

occurred incident to military service, so that *Feres* therefore precluded petitioners' suit (Pet. App. 1a). The court of appeals summarily affirmed in light of this Court's decision in *Johnson* (*id.* at 6a).

Petitioners, who urge this Court to grant review to consider whether *Feres* should be overruled, in effect seek rehearing of *Johnson*. There is plainly no warrant for further review by this Court. This Court reaffirmed *Feres* just last Term in *Johnson,* and petitioners suggest no "special justification" (*Arizona* v. *Rumsey,* 467 U.S. 203, 212 (1984)) demanding a departure from the doctrine of stare decisis in this case. Moreover, since "[t]he doctrine of *stare decisis* has a more limited application when the precedent rests on constitutional grounds, because 'correction through legislative action is practically impossible' " (*Thomas* v. *Washington Gas Light Co.,* 448 U.S. 261, 272-273 n.18 (1980) (plurality opinion), quoting *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)), it follows that stare decisis demands that there be a particularly strong basis for departing from a prior interpretation of a statute. Here, where the statute at issue was construed by this Court in *Feres* a few years after its enactment—and Congress has not revised the FTCA to overrule *Feres* despite the Court's acknowledgement that "if we misinterpret the Act, at least Congress possesses a ready remedy" (340 U.S. at 138)—there is plainly no basis for reconsideration by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1987

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